

# DERAILED

*A report on an investigation into allegations of maladministration relating to financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA)*

*Report No: 3 of 2015/16*



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## Executive Summary

*“It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner.*

Allpay Consolidated Investment Holdings (PTY)Ltd v Chief Executive Officer of the South African Social Security Agency (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)

- (i) *“Derailed”* is my report as Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act 23 of 1994.
- (ii) The report communicates my findings and the appropriate remedial action I am taking in terms of the remedial power given by section 182 (1) (c) of the Constitution, following the investigation of 37 complaints initially lodged by the South African Transport and Allied Workers Union (SATAWU) in 2012 and later pursued by the National Transport Movement (NTM), alleging maladministration and related improper conduct involving procurement irregularities, conflict of interest, nepotism and human resources mismanagement, including victimization of whistle-blowers, by the Group Chief Executive Officer (Mr Montana) and other functionaries at the Passenger Rail Agency of South Africa (PRASA). PRASA is an important and, I believe, strategic organ of state. Its handling of public finances and procurement of goods and services has implications for efficient and effective public transport delivery in compliance with section 195 of the Constitution. Section 195 of the Constitution provides, among others, a requirement that:

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- (iii) *"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
- a. A high standard of professional ethics must be promoted and maintained.*
  - b. Efficient, economic and effective use of resources must be promoted...."*
- (iv) As a public infrastructure provider, PRASA also has implications for the economy. A state owned enterprise with an estimated total net value of assets over **R19 billion** as at 2010/2011, PRASA is an organ of state listed as a National Government Business Enterprise in terms of Schedule 3B of the Public Finance Management Act 1 of 1999 (PFMA). PRASA has four subsidiaries, namely: **Metrorail**, operating commuter rail services in urban areas; **Shosholoza Meyl** operating regional and intercity rail services; **Autopax**, operating regional and intercity coach services; and **Intersite**, managing the corporate property portfolio. PRASA reported an accumulated loss of **R4.4 billion** for 2010/12.
- (v) PRASA reported an accumulated loss of **R1 billion** for 2014/2015 financial year. The budget allocation from Government for PRASA for the MTEF period 2015/2016 to 2017/2018 is **R17.2 billion**. The 37 cases reported by the Complainant mostly deal with alleged procurement irregularities with the amount involved being more than **R2.8 billion**. As the report was being finalized further allegations of procurement irregularities at PRASA were reported.
- (vi) I must indicate upfront that SATAWU's attempt to withdraw its complaint is discomfoting particularly because PRASA management was initially reluctant to cooperate, using the withdrawal as a basis for questioning this office's continuation with the investigation. Allegations of victimisation of whistle-blowers, though not yet adjudicated, do add to the concern. There is an indication, for example, that Mr Craig Nte may have suffered an occupational detriment after whistle-blowing, while a

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member of the Executive of SATAWU which was later deposed followed by SATAWU's inexplicable attempt to withdraw the matter. His matter is dealt with in the part of this report dealing with Human Resources (HR) complaints relating to arbitrary suspensions and dismissals.

- (vii) During the course of the investigations various allegations regarding victimisation of current and former employees of PRASA were raised by the Complainant and some Executives. I have however decided to defer this issue to be adjudicated upon in volume 2 of this report.
- (viii) PRASA is controlled by a PRASA Board of Control (PRASA Board), chaired by a Non-Executive Chairman, and which in terms of section 49(2) (b) of the PFMA is its Accounting Authority. The Group Chief Executive Officer (GCEO) has delegated authority in terms of *PRASA Powers and Authority of the Board and Delegation of Authority*.
- (ix) The essence of the complaints was that Mr. Montana, then Group Chief Executive Officer (GCEO) of PRASA, and/ or PRASA, improperly awarded tenders; appointed service providers without following proper tender processes and allowed maladministration, corruption, conflict of interest and financial mismanagement, in the procurement of goods and services and managed human resources irregularly, including nepotism and the improper handling of whistle-blowers. NTM (the Complainant) specifically alleged that:
  - 1. PRASA improperly cancelled all contracts for cleaning services on 15 March 2012, and subsequently improperly appointed Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services on a contract valued above

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the R500 000 threshold without advertising and in contravention of the Treasury Regulations and Supply Chain Management (SCM) Policies of PRASA;

2. Reakgona Commercial and Industry Hygiene was awarded a contract due to its association with the GCEO's close business associate, Mr. Isaac Modiselle;
3. PRASA appointed Sidas Security Company improperly at a higher rate on tender 525/2010/GAU/PS to replace National Force Security on the instructions of the GCEO but improperly terminated the contract 9 months after its appointment;
4. Proper procurement processes were not followed in the appointment of Vimtsire Security Services Company which allegedly failed to meet the minimum requirements for appointment. Royal Security was also allegedly appointed on the same tender in 2009 and allegedly billed PRASA R2. 8 million instead of the agreed amount of R2. 5 million per month;
5. The appointment of Royal Security on the tender concerned was irregular, as its original contract WM/FIN/CA/7/24/06 was terminated by PRASA due to its underperformance;
6. An amount of R600 000, alleged to have been improperly authorised by PRASA's Head: Corporate Services, was improperly paid in advance to Enlightened Security for a contract for the Tshwane Region prior to its appointment on tender TSH/RISK/436/10/2008;

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7. A Dark Fibre and Integrated Communication Systems tender amounting to R800 million was improperly awarded to Siemens nationally during the financial year 2009/2010 whereas the advertisement was for a narrower reach;
  8. A tender for the installation of high speed passenger gates worth R800 million was awarded to a certain contractor in 2009/2010 for the Doornfontein station but it was later improperly extended to other stations nationally without following proper tender processes;
  9. PRASA improperly incurred an upfront payment, to a developer of the City Mall for the construction of an underground train station (Bridge City Project), without going on a bidding process and without proper authorisation during the periods 2008 to 2010;
  10. PRASA improperly appointed a media company to produce *Hambanathi* during 2008/2009;
  11. A PRASA Board member, Mr Vusi Twala, was improperly awarded a tender by Intersite, a subsidiary of PRASA, to provide CCTV cameras;
  12. A Change Management Consultant, Mr Ezra Ndwandwe, was appointed at a cost of R2 million without following proper procurement processes during 2008/2009;
  13. The GCEO improperly awarded a tender amounting to an estimated R10 million to the erstwhile CEO of the South African Rail Commuters Corporation (SARCC), Mr Edwin Lekota, for the development of a contingency emergency

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preparedness programme for Metrorail without following proper procurement processes;

14. Umjanji Consortium, a company formed and incorporated after the closing date for submission of tenders on tender HO/CA/739/02/2010, was improperly awarded a tender on Media Advertising and Broadcasting Concession Agreement in March 2011 without following proper procurement processes in contravention of the PRASA Supply Chain Management Policies;
15. The GCEO improperly awarded a contract for the provision of professional advisory service on the signalling project to a friend, Mr Makhensa Mabunda of Siyaya DB, who did not possess the necessary skills and experience and without following proper procurement processes;
16. A tender amounting to R22 million for the Park Station Development Framework was allegedly not advertised but recommended for approval to be awarded to a contractor named ARUP, which was associated with Dr Gasa, a member of the PRASA Board, during November 2009;
17. Between the years 2008 and 2010, PRASA engaged construction companies in the 2010 Soccer World Cup Station Building Project, the Capex Project and renovation of existing stations without following proper procurement processes and an overspending of R2 billion amounting to fruitless and wasteful expenditure was incurred in addition to the budgeted amount of R3 billion;
18. During January 2010, Autopax, a subsidiary of PRASA, lost buses during theft and PRASA failed to pursue an investigation into the matter but instead replaced the buses at a cost of R2.8 million;

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19. In April 2010, Autopax concluded an irregular security contract with Futuris Guarding (PTY) amounting to R54 337.20 per month;
  20. PRASA was delaying to pay Rasakanya Builders, the service provider to PRASA Corporate Real Estate Solutions (PRASA Cres), and has improperly served a notice of termination of the contract, thereby leaving 36 employees of Rasakanya Builders without pay for services rendered;
  21. The GCEO/PRASA incurred irregular and/or fruitless and wasteful expenditure relating to the following transactions: upfront payment of an amount of R80 million for the FIFA World Cup sponsorship without proper approval; budget and/or allocated funds which resulted in fruitless and wasteful expenditure; and to this end, the GCEO invested funds with FIFA based on the agreement that PRASA would recoup the expenditure through the sales of tickets to commuters/soccer fans and it is asserted that the money was never recovered;
  22. Brand Leadership was awarded the new PRASA branding contract to the value of R9 million. However, the contract amount was improperly inflated to R19 million, thereby resulting in irregular/fruitless and wasteful expenditure of R10 million;
  23. During the period 2009/2010, the GCEO allegedly requested R1 billion funding from the National Treasury on the pretext that it would be used during the taking over of operations of Shosholozza Meyl. It is alleged that National Treasury paid R500 million, and nevertheless, the funds were never used for their intended purpose;

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24. PRASA Operational Expenditure(OPEX) budget was improperly overspent by R2.2 billion without the approval of the PRASA Board during the period 2009/2010;
25. PRASA Head Office staff vacated its Offices at Jorissen Building 14 months before the expiry of the lease agreement but PRASA continued to pay rental, which constituted fruitless and wasteful expenditure;
26. After vacating Jorissen Building, PRASA acquired Umjantshi House Building to accommodate its Head Office staff without following proper procurement processes and without a proper budget approval;
27. The GCEO instructed PRASA Management at the Intersite Building in Woodmead to vacate the premises 20 months prior to the expiry of the lease agreement, but continued to pay for the lease, thereby constituting fruitless and wasteful expenditure;
28. The GCEO dismissed five Senior Executives unlawfully during the years 2008 and 2011 and the CCMA ordered their reinstatement, which he rejected and instead compensated them with an estimated R5 million, which constituted fruitless and wasteful expenditure. The Group Executive HR was replaced improperly by the GCEO's uncle, Mr Mphefo Ramutloa, without proper recruitment processes being followed;
29. During February 2010, an unlawful electronic funds transfer (EFT) was uncovered in a forensic report by Deloitte, in which R8.1 million was fraudulently transferred in the Durban and Tshwane Regions but no action was taken against those implicated in the transactions;

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30. During the period 24 to 27 September 2009, Mr Montana undertook a leisure trip in a Blue Train to Cape Town together with 10 female companions and returned in a South African Airways (SAA) flight costing PRASA R17 000.00. The total cost of the trip was allegedly an estimated R170 000.00 which constituted fruitless and wasteful expenditure;
31. During 2008/2009, the Executive Corporate Affairs Manager, Mr P Mabe, allegedly received salaries from PRASA despite having left its service and Mr Montana allegedly misled the Exco and the PRASA Board that the employee was not on PRASA's payroll.
32. PRASA disregards the labour relations processes and conditions of employment when dealing with labour issues thereby costing the entity enormous amounts of money that resulted in fruitless and wasteful expenditure. To this end it is alleged that:
- a) Mr Stephen Ngobeni, Mr Montana's cousin in the employment of PRASA, was improperly appointed as a Training Contractor to provide training services on the handling of People with Disability. He was later allegedly improperly transferred without a disciplinary process being instituted against him; and
  - b) Mr Montana unlawfully engages yearly in a series of suspending employees perpetually with payment of salaries costing PRASA an estimated R3.35 million in fruitless and wasteful expenditure.

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33. The Complainant further raised allegations of conflict of interests relating to the following members of the PRASA Board:
- a) A member of the PRASA Board, Dr Bridgette Gasa, who is also a Director of ARUP, a company alleged to be contracted to provide advisory services to PRASA, and a Director in another company that is also providing consultancy services to PRASA, is benefiting improperly as her involvement in these companies while serving as a member of the PRASA Board constitutes a conflict of interest;
  - b) The Chairman of the PRASA Board, Mr Sfiso Buthelezi is alleged to be the Chief Executive Officer of Makana, a subsidiary of Cadiz, a company allegedly providing advisory service to PRASA on the Rolling Stock Recapitalisation Project. His alleged involvement is asserted to constitute a conflict of interest; and
  - c) The wife of Mr Bushy Boshielo was appointed as a General Manager of Autopax without following proper recruitment processes during Mr Boshielo's tenure as a member of PRASA Board.
34. During 2008/2009, Mr Montana improperly appointed Mr Chimanda as a Special Advisor at PRASA at a cost of R2 million, without following proper recruitment processes and in contravention of the PRASA Recruitment Policy.
35. About 17 tenders/contracts collectively exceeding R2.8 billion were specifically identified by the Complainant for investigation of supply chain irregularities, including non-competitive processes, cronyism, scope creep, cost overruns, overpayment and fruitless and wasteful expenditure.

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- (x) Despite each complaints being a distinct matter worthy of a separate investigation, the 37 complaints were investigated collectively thus forming one systemic investigation. The following issues were identified in respect of each complaint with a view to focusing the investigation:
1. Did PRASA improperly extend, to other stations nationally, a tender for the installation of high speed passenger gates worth R800 million to Siyangena Technologies in 2009/2010 for the Doornfontein station which was later extended to other stations nationally?
  2. Did PRASA improperly extend the appointment of Siemens tender for the Dark Fibre and Integrated Communication Systems amounting to R800 million to other stations nationally, during the financial year 2009/2010 when it was only advertised for Gauteng?
  3. Did PRASA improperly terminate all contracts for cleaning services and was the subsequent appointment of Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services improper?
  4. Did PRASA improperly appoint Sidas Security on a security tender in replacement of National Force Security on the GCEO's instruction?
  5. Did PRASA improperly appoint of Vimtsire Security Services, which failed to meet the minimum requirements for appointment on tender number 525/2010/GAU/PS?

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6. Did PRASA improperly appoint and pay Royal Security R2.8 million instead of R2.5 million for security services?
  7. Did PRASA improperly advance a payment of R600.000.00 to Enlightened Security?
  8. Did PRASA improperly appoint a media company to produce *Hambanathi Magazine* during 2008/2009?
  9. Did PRASA improperly appoint Mr Ezra Ndwandwe, on a Change Management Consultancy at a cost of R2 million in 2008/2009?
  10. Did PRASA improperly increase the scope and value of marketing and communications tender number HO/M&C/305/07/2009 awarded to Brand Leadership for R29 million?
  11. Did the GCEO improperly appoint Mr Edwin Lekota on a tender amounting to R10 million for the development of a Contingency Emergency Preparedness Programme for Metrorail?
  12. Did PRASA improperly award a tender to Umjanji Consortium, for the media, advertising and broadcasting concession agreement?
  13. Did the GCEO improperly award a contract for the provision of professional advisory service on the signalling project to a friend, Mr Makhensa Mabunda of Siyaya DB, who did not possess the necessary skills and experience and without following proper procurement processes?

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14. Did PRASA improperly award a tender in the amount of R22 million for Park Station Development Framework to ARUP, a company associated with its board member?
  15. Did PRASA improperly fail to investigate the theft of the buses of its subsidiary, Autopax?
  16. Did PRASA improperly award a security services contract to Futuris Guarding in April 2010 at Autopax City to City for a total amount of R231 204.00?
  17. Did PRASA improperly terminate the Rasakanya Builders contract on 1 November 2012?
  18. Did the GCEO/PRASA improperly implement an upfront payment in the amount of R 80 million for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds thus constituting to fruitless and wasteful expenditure?
  19. Did PRASA improperly incur an over expenditure of R2.2 billion on PRASA's operations budget in 2009/2010 financial year?
  20. Did PRASA fail to spend a subsidy of R500 million received for Shosholoza Meyl for the 2009/2010 period and not use it for its intended purpose?
  21. Did PRASA incur rental expenditure for Jorissen Building after vacating it 20 months before the expiry of its lease resulting in fruitless and wasteful expenditure?

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22. Did PRASA improperly incur rental expenditure on Intersite Building after vacating the building 10 months before the expiry of its lease resulting in fruitless and wasteful expenditure?
  23. Did the GCEO improperly terminate contracts of Executives resulting in fruitless and wasteful expenditure amounting to an estimated R5 million?
  24. Did the GCEO improperly suspend employees resulting in labour dispute settlements amounting to R3.35 million thus constituting fruitless and wasteful expenditure?
  25. Did PRASA Board Chairman, Mr Sfiso Buthelezi, improperly fail to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory services to PRASA on the Rolling Stock Programme?
  26. Did Dr Bridgette Gasa, a PRASA Board member improperly fail to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company providing consultancy services to PRASA?
  27. Did the GCEO improperly appoint Mr Joel Chimanda at a cost of R2 million as a Special Advisor?
  28. Did PRASA improperly replace the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa without following proper recruitment process?

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29. Did PRASA improperly fail to take disciplinary action against staff members allegedly involved in fraudulent Electronic Funds Transfers amounting to R8.1 million?
  30. Did Mr. Montana improperly transfer Mr Stephen Ngobeni without disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability thereby amounting to maladministration?
  31. Did PRASA improperly implement an upfront payment to a developer of the City Mall for the construction of an underground train station on the Bridge City Project without proper authorisation during the period 2008 to 2010?
  32. Did PRASA improperly award a CCTV cameras tender to Mr Vusi Twala?
  33. Did PRASA improperly engage various construction companies in respect of 2010 Soccer World Cup Projects?
  34. Did PRASA improperly procure Umjantshi House from Transnet in September 2009 by flouting supply chain management prescripts?
  35. Did PRASA improperly appoint Ms Shiela Boshielo, the wife of Mr. Bushy Boshielo, the former member of the PRASA Board as General Manager of Autopax?
  36. Did Mr Montana improperly take a Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and

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return by SAA flight at an estimated cost of R170 000.00 and did such amount to fruitless and wasteful expenditure?

37. Did PRASA improperly pay a salary to Mr Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure?
38. Although the investigation covered all abovementioned issues, the findings on seven (7) issues will be made in a follow up report due to failure by PRASA to provide certain requested documents and information.
- (xi) The investigation included the sourcing and analysis of corporate documents pertaining to the impugned transactions, interviews and meetings with selected witnesses and research into the regulatory framework, which includes the Constitution, laws, Treasury Regulations and corporate policies.
- (xii) In arriving at the **findings**, I have been guided by the standard approach adopted by the Public Protector South Africa as an institution, which simply involves asking: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amount to improper conduct or maladministration? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?
- (xiii) As is customary, the "what happened" enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. To arrive at a finding on what happened, the investigation, like all others, relied on oral and documentary submissions by the Complainant and PRASA management,

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principally represented by the GCEO, Mr Montana. Interviews/meeting held primarily to clarify evidence already gathered, were also held with the Complainant, Mr Montana assisted by his lawyers and the PRASA Board. The question regarding what should have happened on the other hand, relates to the standard that the conduct in question should have complied with.

- (xiv) In determining the standard that the GCEO and other functionaries at PRASA should have complied with, to avoid improper conduct or maladministration, I was guided, as is customary, by the Constitution, national legislation and applicable policies and guidelines, including corporate policies and related regulatory instruments. Key among corporate policies, that informed the investigation was the *PRASA Procurement and Supply Chain Management Policy (SCM Policy)* and the *Delegation of Authority* document. The SCM Policy approved in 2009 thus preceding the matters investigated, is very comprehensive. It commences with defining supply chain management and its purposes.
- (xv) The SCM Policy affirms and commits to uphold section 217 of the Constitution setting the vision behind it and standards to be upheld in state procurement or Supply Chain Management (SCM) processes, which vision includes ensuring a fair, equitable, transparent, competitive and cost-effective public procurement system. The SCM Policy also roots itself in Treasury Regulations regulating SCM. It further outlines the steps to be taken in pursuit of the procurement of goods and services within PRASA covering Demand Management, Contract Administration, Material Management, Disposal Management, Procurement Strategy and Acquisition Management. Also regulated are permissible deviations, which include urgency and single source providers. The policy also deals with management of conflict of interest. The investigation was also guided by Human Resources policies, to the extent that some allegations involved the appointment, promotion and termination of employees,

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including executives. In this regard section 195 of the Constitution setting a standard for all conduct in state affairs was relied on to a great extent. To the extent that there was an allusion to whistle-blower victimization, I took into account the provisions of the Protected Disclosures Act 26 of 2000.

- (xvi) At the commencement of the investigation, the allegations were brought to the attention of PRASA management through the GCEO, Mr Montana, the Chairman of the PRASA Board and then former Board. Towards the final stages, the new Board was engaged, including sharing of provisional findings with it and enlisting its support with regard to missing or conflicting information in the management submissions.
- (xvii) All information and evidence gathered during interactions with PRASA management and complainants were taken into account in an effort to reconstruct what happened and if what happened was in line with the rules. Parties implicated by the evidence gathered by the time a Provisional Report had been prepared, were sent notices under section 7(9) of the Public Protector Act alerting them of evidence implicating them and the possibility of adverse findings. A discretionary notice was also sent to the Complainant alerting them to allegations not supported by evidence. In all cases, responses were solicited and affected parties given an opportunity to provide further information and to engage via meetings.
- (xviii) I must record that the investigation team and I had immense difficulty piecing together the truth as information had to be clawed out of PRASA management. When information was eventually provided, it came in drips and drabs and was incomplete. Despite the fact that the means used to obtain information and documents from PRASA included a subpoena issued in terms of section 7(4) of the Public Protector Act, many of the documents and information requested are still outstanding. Until about three weeks before issuing the report, PRASA was still being asked for

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outstanding documents and information on contracts awarded and some staff appointments.

- (xix) I must also indicate that the authenticity of many of the documents submitted by PRASA management as evidence, principally relating to procurement, is doubtful. Many of the memoranda for approval of tenders and related documents submitted by PRASA management, were undated, unsigned and, at least in one case, incomplete. Examples in this regard include documents relating to the contracting of Vimtsire Security, ARUP and Enlightened Security Services. In some of the cases, had this been an audit, only a disclaimer would be a legitimate audit outcome.
- (xx) After unsuccessfully asking the new PRASA Board and its Chairman to assist, I decided it would be in the public interest to proceed with the report and defer unanswered questions to second report. The second report has also been necessitated by further allegations of financial impropriety, corruption and tender irregularities at PRASA, which came too late to be investigated and incorporated in this report. The issues covered in the original 37 complaints that have been deferred to the second report are the following:
1. Did PRASA improperly implement an upfront payment to a developer of the City Mall for the construction of an underground train station on the Bridge City Project without proper authorisation during the period 2008 to 2010?
  2. Did PRASA improperly award a CCTV cameras tender to Mr Vusi Twala?
  3. Did PRASA improperly engage various construction companies in respect of 2010 Soccer World Cup projects?
  4. Did PRASA improperly procure Umjantshi House from Transnet in September 2009 by flouting supply chain management prescripts?

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5. Did PRASA improperly appoint Ms Shiela Boshielo, the wife of Mr. Bushy Boshielo, the former member of the PRASA Board as General Manager of Autopax?
  6. Did Mr Montana improperly take a Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000 and did such amount to fruitless and wasteful expenditure?
  7. Did PRASA improperly pay a salary to Mr Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure?
- (xxi) What is encouraging is that both Mr Montana, and the Board have welcomed the Provisional Report which did not differ vastly from this final report and committed themselves to implementing the remedial action once the report is made final. For this, I am grateful as such conduct is line with the constitutional ideal regarding the relationship between the Public Protector and organs of state as envisaged in section 181 of the Constitution. Section 181 enjoins organs of state to assist, and protect the Public Protector and other institutions supporting constitutional democracy to ensure their effectiveness, among other things.
- (xxii) After a careful examination of the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by PRASA , my findings are the following:
1. **Regarding PRASA's alleged improper extension to other stations nationally, a tender for the installation of high speed passenger gates worth R800 million to Siyangena Technologies in 2009/2010 initially advertised for the Doornfontein station, Gauteng:**

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- a) The allegation that PRASA improperly extended the scope of a tender awarded to Siyangena Technologies for the supply and installation of high speed passenger gates at Doornfontein station to a national scope is substantiated. However, the total amount of the contract was **R1.95 billion** and not **R800 million** as alleged.
- b) The scope of a tender for high speed passenger gates advertised for two train stations, Doornfontein and Nasrec in Gauteng was awarded by the PRASA Board to Siyangena Technologies, and later extended to cover additional stations, on the basis of a closed bidding process with those that had bid for the two Gauteng stations.
- c) The extension of the tender scope beyond what had been advertised was in contravention of paragraph 11.3.2 of PRASA SCM Policy, section 38 of the PFMA, PPPFA and section 217 of the Constitution requiring fair, equitable, transparent, competitive and cost-effective bidding processes.
- d) The extension of Siyangena Technologies' contract to more stations than were specified in the tender advertisement accordingly constitutes maladministration and improper conduct.
2. **Regarding PRASA's alleged improper extension of a tender awarded to Siemens for the Dark Fibre and Integrated Communication Systems amounting to R800 million to additional stations nationally, during the financial year 2009/2010 when it was only advertised in Gauteng:**

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- a) The allegation that PRASA improperly extended the scope and value of a tender awarded to Siemens for Dark Fibre and Integrated Communication Systems beyond what was advertised and approved by the Corporate Tender Procurement Committee (CTPC) with the effect of substantially increasing the contract price is substantiated. However, the total contract amount was **R256 million** and not **R800 million** as alleged.
  - b) PRASA improperly extended, to the Durban (KZN) and Western Cape regions, a tender for the design, supply and installation of the Dark Fibre and Integrated Communication Systems, which had been advertised and won by Siemens for the Wits and Pretoria region, without following an open and competitive tender process. This was in contravention of paragraph 11.3.7. of PRASA SCM Policy and section 217 of the Constitution, among others.
  - c) The extension of the scope and price of the design, supply and installation of the Dark Fibre and Integrated Communication Systems tender to other regions accordingly constitutes maladministration and improper conduct.

**3. Regarding PRASA's alleged improper termination of all contracts for cleaning services and subsequent irregular appointment of Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services:**

- (a) The allegation that PRASA improperly terminated the contracts of seven (7) cleaning companies and improperly replaced them with Reakgona Commercial

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and Industry Hygiene (Reakgona) and Katanga Cleaning Services (Katanga), is substantiated.

- (b) The contracts of 7 cleaning companies were summarily terminated by Mr Montana on 14 March 2012 in contravention of paragraph 13.1 of the contracts between PRASA and the cleaning companies, which prescribes a 48 hour notice to be given to the defaulting party to remedy a breach. He replaced them with Reakgona and Katanga on 15 March 2015, whose services were procured without a transparent and competitive process.
  - (c) The conduct of Mr. Montana with regard to the summary termination of the contracts of 7 cleaning companies is also inconsistent with the provisions of the PRASA SCM Policy, the PFMA, PPPFA and section 217 of the Constitution.
  - (d) PRASA's summary termination of the contracts of 7 cleaning companies and their irregular replacement with Reakgona and Katanga, accordingly constitutes maladministration, abuse of power and improper conduct.
  - (e) The failure by Mr Montana to afford the 7 cleaning companies an opportunity to explain themselves and possibly remedy the breach cannot be considered to be in line with section 33 of the Constitution and the provisions of PAJA.
- 4. Regarding PRASA's alleged improper appointment of Sidas Security on a security tender in replacement of National Force Security on the GCEO's instruction:**

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- a) The allegation that Sidas Security was improperly appointed to replace National Force Security is substantiated. However, no evidence could be found to prove that the improper appointment was done on Mr Montana's instructions.
  - b) The month to month contract of National Force Security was terminated on 15 April 2009 and awarded to Sidas Security for **R3 711 197.72**, by Mr Chris Moloji without a tender process or competitive quotations being sought.
  - c) The appointment was in contravention of paragraph 11.3.5 of the PRASA SCM Policy and paragraph 4.7.5.1 of the National Treasury SCM Guidelines of 2004.
  - d) PRASA's failure to take action against the authorised official, who approved the submission for the appointment of Sidas Security, constitutes maladministration and improper conduct.

**5. Regarding PRASA's alleged improper appointment of Vimtsire Security Services, which failed to meet the minimum requirements for appointment on tender number 525/2010/GAU/PS:**

- a) The allegation that Vimtsire Security Services was improperly appointed while not meeting the requirements is substantiated.
- b) PRASA appointed Vimtsire Security Services on two contracts for tender 525/2010/GAU/PS without an advertisement or competitive quotations. The first contract was signed on 23 February 2010 without specifying the period of the contract for an amount of **R4 596 480.00** and the second contract was signed on 29 May 2010 for the period 13 March 2010 to 13 August 2010 for the amount of **R7 537 680.00**. The contract was further extended by PRASA from 1

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January 2011 to 31 December 2011 for an amount of **R14 441 976.00**, without a competitive process.

- c) The appointment and extension of the contract of Vimtsire Security amounting to **R26 576 136 00.00** were unlawful, in contravention of paragraph 11.3.1 of the PRASA SCM Policy read with the Delegation of Authority, section 217 of the Constitution, among others.
- d) The conduct of PRASA in appointing and extending the contract of Vimtsire Security Services irregularly accordingly constitutes maladministration and improper conduct.

**6. Regarding PRASA's alleged improper appointment and payment of Royal Security for an amount of R2.8 million for security services:**

- a) The allegation that Royal Security was paid **R2.8 million** instead of **R2.5 million** stipulated in the contracts, was not substantiated.
- b) Documentary evidence shows that the amount paid by PRASA to Royal Security was **R2.5 million**.

**7. Regarding PRASA's alleged improper advance payment of R600.000.00 to Enlightened Security:**

- a) The allegation that Enlightened Security was irregularly given an advance payment of about **R600.000.00** is substantiated.

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- b) PRASA made a first payment of **R684.720.00** to Enlightened Security for security services at Mabopane station on **22 October 2008** which was preceded by an invoice dated **19 September 2008** before the signing of the contract and the issuing of a *Notice to Proceed*, which followed on **17 October 2008**.
  - c) Mr Joe Ngcobo's conduct in making advance payments to Enlightened Security accordingly constitutes maladministration and improper conduct.
  - d) PRASA management became aware of this violation but took no disciplinary steps against the manager responsible, Mr Joe Ngcobo, despite initially commencing a disciplinary process. This conduct is in violation of the accounting officer's responsibility under section 38 of the PFMA and is accordingly irregular and constitutes maladministration and improper conduct.

**8. Regarding PRASA's alleged improper appointment of a media company to produce Hambanathi Magazine during 2008/2009:**

- a) The allegation that PRASA improperly appointed a media company to produce *Hambanathi* is substantiated.
- b) PRASA entered into a contract (referred by it as a partnership) with KG Media providing for the publication and distribution of PRASA information to its commuters and stakeholders, through *Kwela Express*, which used to be a corporate magazine of Metrorail (subsidiary of PRASA, using the name *Hambanathi* when Mr Pule Mabe, the then owner of **Kwela Express**, was employed there).

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- c) The contract was from 1 April 2012 to 1 April 2015 (a period of 3 years) for the amount of **R465 669.75** per month which translates to **R5 588 000.37** per annum and a total contract amount of **R16 764 111.00** without a competitive and transparent bid process. Mr Montana extended the contract in March 2015 for a further 3 years **R16 764 111.00** despite a forewarning through a notice issued in terms of section 7(9) of the Public Protector Act, that the arrangement was likely to be determined to be unlawful. Effectively, PRASA is renting space on *Hambanathi/Kwela* for the price of about R465 669.75 a month.
- d) Considering the fact that PRASA created *Hambanathi/Kwela* and simply failed to register it as a patent, I find the arrangement with Mr Mabe's company, KG Media, rather bizarre.
- e) The appointment of KG Media, without a competitive process did not comply with requirements for single sourcing or any of the permissible procurement processes prescribed in the PRASA SCM Policy as production of a corporate newsletter is not an exclusive skills area or product for KG Media and paragraph 11.3.3 of the PRASA SCM Policy prohibits unsolicited bids.
- f) PRASA's appointment and extension of the contracts with KG Media for the *Hambanathi* totalling an amount of **R 33 528 222.00** is unlawful, a flagrant contravention of PRASA's own SCM Policy, Treasury Regulations, the PFMA and section 217 of the Constitution and constitutes maladministration and improper conduct.
- g) Mr Montana's recent extension of the *Hambanathi* contract while being aware contract of an impending finding of maladministration regarding the

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*Hambanathi* while having asked for time extension to respond to the section 7(9) notice, is an act of bad faith, which is inconsistent with his responsibilities under section 195 of the Constitution, requiring a high standard of professional ethics and, which, according to the Constitutional Court, in *Khumalo versus MEC for Education KwaZulu Natal*, imposes a duty on him to correct an irregularity once his attention has been drawn to it. His actions in this regard, constitute gross maladministration and improper conduct. Such conduct is not only unlawful but also displays disconcerting disregard for the rule of law.

**9. Regarding PRASA's alleged improper appointment of Mr Ezra Ndwandwe, on a Change Management Consultancy at a cost of R2 million in 2008/2009:**

- a) The allegation that Mr Montana improperly appointed Mr. Ezra Ndwandwe, is substantiated. However, it is the Consultancy and not the person that was appointed and the amount involved was **R10 833. 774. 00** for 12 months.
- b) Ndwandwe Consultancy was appointed by Mr. Montana for the Value Creation and Culture Change process at PRASA on 14 June 2008 for the amount of R6 220 800.00 without requiring three quotations from suppliers in the PRASA database as prescribed in paragraph 11.3.1.1 of the PRASA SCM Policy. The contract was extended for a further 6 months with the contract amount variation of **R4 612 974.00** exceeding 40%.
- c) The appointment of Ndwandwe Consultancy by Mr Montana was unlawful, in contravention of PRASA's own SCM Policy, Treasury Regulations on procurements, the PFMA and section 217 of the Constitution and accordingly constitutes improper conduct and maladministration.

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- d) From the evidence it is clear that Mr Ndwandwe's consultancy's appointment was triggered by an existing relationship, which had included an excursion that took place immediately before the impugned contract was initiated. It is also clear that no process was followed to establish if any other agency offered similar services. More importantly, no demand management exercise preceded the engagement. Unfortunately, the investigation did not examine what the excursion mentioned in the procurement memorandum dated 16 September 2008 was for, whether or not PRASA paid for it and how Mr Ndwandwe's consultancy had been procured it as the impugned engagement apparently flows from that excursion. This constitutes improper conduct and maladministration.

**10. Regarding PRASA's alleged improper increase of the scope and value of a marketing and communications tender number HO/M&C/305/07/2009 awarded to Brand Leadership:**

- a) The allegation that PRASA improperly increased the scope and price of a marketing and communications tender awarded to Brand Leadership, is substantiated. However the tender price and price variation amount were actually higher than alleged.
- b) The scope of a tender recommended by the PRASA Bid Adjudication Committee (BAC) at the value of **R12.000.000.00** was increased beyond the advertised scope to **R29. 528. 000.00** by PRASA's CTPC, when it awarded it without the Accounting Officer's approval. The project timeline was also stretched, by an additional 6 months. It originally ran from October 2009 to September 2010 and was extended to March 2011.

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- c) In increasing the scope and price of the advertising tender in excess of what was advertised and without approval by the GCEO, the conduct of the PRASA CTPC was in contravention of the PRASA SCM Policy, National Treasury SCM Guidelines 5.16.1.1.1 of 2004 setting out a proper process for demand management and the process to be followed in extending the scope of a contract. The conduct of PRASA was improper and constitutes maladministration.

**11. Regarding the GCEO's alleged improper appointment of Mr Edwin Lekota on a tender amounting to R10 million for the development of a Contingency Emergency Preparedness Programme for Metrorail:**

- a) The allegation that PRASA improperly appointed Mr Edwin Lekota on a tender is substantiated.
- b) Mr Lekota's Lekga Investment Holdings, was appointed directly by PRASA for the ISO 9001: 2000 compliance work without a competitive process.
- c) I am unable to accept Mr Montana's submission that the appointment of Mr Edwin Lekota, former CEO of SARCC, the predecessor of PRASA on a panel with, Dr Chris Dutton and Mr Friedel Mulke as part of the Board of Inquiry in terms of his powers. The evidence shows that Carundell was indeed awarded a contract to deal with the emergency arising from the burning of trains in Soshanguve, City of Tshwane, Gauteng. The same evidence shows that Mr Lekota was subcontracted by Carundel to deal with the burning of the trains.

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- d) However, I am encouraged by Mr Montana's undertaking in his response to the provisional findings, to ensure that such experts are, in future, invited to be part of an existing panel of experts in the PRASA database.

**12. Regarding PRASA's alleged improper award of a tender to Umjanji Consortium, for the media, advertising and broadcasting concession agreement:**

- a) I have deferred my findings on this complaint as PRASA is yet to submit some of the bid documents, key being the tender documents submitted by Umjanji Consortium, which need to be subjected to a forensic examination. Evidence uncovered so far confirms that:
- i. On 31 January 2011, Mr Montana awarded the Media and Broadcasting Services tender HO/CA739/02/2010 to Umjanji Consortium, an entity led by Provantage Media, which is apparently the only constituent part of Umjanji Consortium that attended the compulsory briefing session for the tender on 22 February, 2010.
  - ii. Umjanji Consortium was not in existence at the time of closure of the tender on 11 March 2010.

**13. Regarding the GCEO's alleged improper awarding of a contract for the provision of professional advisory service on the signalling project to a friend, Mr Makhensa Mabunda of Siyaya DB**

- a) No evidence was found substantiating that Mr Mabunda was or is Mr Montana's friend and that such friendship informed his company's appointment.

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- b) Mr Montana did appoint Siyaya DB, which scored slightly lower than Mott Macdonald, on tender HO/INF/203/06/2010 for rendering of technical assistance and supervision for the national signalling project, following an open and competitive tender process.
  - c) I have accepted these reasons given being that the highest bidder failed to meet PRSASA's requirements relating to pricing certainty and BEEE compliance as both cogent and rational
  - d) I am accordingly unable to find that the award of the tender to Siyaya DB by Mr Montana and/ or PRASA constitutes maladministration or improper conduct.

**14. Regarding PRASA's alleged improper awarding of a tender in the amount of R22 million for Park Station Development Framework to ARUP, a company associated with its board member.**

- a) The allegation that ARUP was improperly awarded a tender for the Park Station Development Framework is substantiated. However, the amount involved was much less than the alleged **R22 million**, it was **R3 898 940.00** which did not require Board approval.
- b) PRASA conceded that a proper procurement process was not followed in the appointment of ARUP and took action against the persons implicated in the appointment concerned.

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- c) I accordingly do not see the need to make a finding of maladministration or improper conduct. The aspect relating to a board member's alleged involvement is addressed separately.

**15. Regarding PRASA's alleged failure to investigate the theft of buses of its subsidiary, Autopax:**

- a) The allegation that PRASA improperly failed to investigate the theft of buses of its subsidiary, Autopax, is not substantiated.
- b) Records show that PRASA conducted an investigation and internal disciplinary hearings regarding the theft of the Autopax buses leading into the suspension of one employee and dismissal of another. Furthermore, cases were registered with the SAPS in respect of the theft of the buses and there were regular follow up activities.

**16. Regarding PRASA's alleged improper awarding of a security services contract to Futuris Guarding in April 2010 at Autopax City to City for a total amount of R231 204.00:**

- a) The allegation that Futuris Guarding was improperly appointed is substantiated. However, the amount involved was higher than alleged as it was about **R10.6 million** for a six month contract.
- b) Although security unarguably involves danger as envisaged in urgency provisions of paragraph 11.3.5 of the PRASA SCM Policy, the implementation of urgency procurement failed to comply with the procedure

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laid out in the PRASA SCM policy in that the deviation was not ratified and approved by the GCEO, a deviation I consider material.

- c) The actions of Mr Joe Buthelezi, Acting Supply Chain Manager in the appointment of Futuris Guarding on a security contract on confinement, without the GCEOs approval constitutes maladministration and improper conduct.
- d) PRASA's failure to take disciplinary action Mr Buthelezi for the appointment of Futuris Guarding constitutes improper conduct and maladministration.

**17. Regarding PRASA's alleged improper termination of the Rasakanya Builders contract on 1 November 2012:**

- a) The allegation that PRASA improperly terminated the contract of Rasakanya Builders is not substantiated.
- b) PRASA terminated its month to month contract with Rasakanya Builders on 28September 2012, with effect from 01november, 2012, giving it a month's notice.
- c) I could not find any impropriety with the termination and accordingly am unable to find that PRASA's conduct constitutes maladministration or improper conduct.

**18. Regarding the GCEO/PRASA's alleged improper implementation of an advance payment in the amount of R 80 million for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds thus constituting to fruitless and wasteful expenditure:**

- a) The allegation that PRASA made an advance payment in the amount of R80 million to FIFA without proper approval, budget or allocated funds which resulted in fruitless and wasteful expenditure is not substantiated.

**19. Regarding PRASA's alleged improper incurring of an over expenditure of R2.2 billion on PRASA's operations budget in 2009/2010 financial year:**

- a) The allegation that PRASA improperly incurred an over expenditure is substantiated. However, the amount involved was far less than alleged. It was **R523 792 767.00**
- b) PRASA exceeded its budget by **R523 792 767.00** for the 2009/2010 financial year.

**20. Regarding PRASA's alleged failure to spend a subsidy of R500 million received for Shosholozza Meyl for the 2009/2010 period and not use it for its intended purpose:**

- a) The allegation that PRASA failed to spend the subsidy received for Shosholozza Meyl for 2009/2010 financial year is not substantiated.
- b) PRASA received a government subsidy of R450.00.00 for the year 2009/10 for Shosholozza Meyl.
- c) I am unable to confirm if the subsidy was indeed used for its intended purpose as the operational expenditure for Shosholozza Meyl was not reflected separately in the overall budget of PRASA.

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- 21. Regarding PRASA's alleged incurring of rental expenditure for Jorissen Building after vacating it 20 months before the expiry of its lease resulting in fruitless and wasteful expenditure:**
- a) The allegation that PRASA improperly incurred rental expenditure which constitutes fruitless and wasteful expenditure due to vacating of the Jorissen Building before the expiry of its lease agreement is substantiated.
  - b) On the authority of Mr Montana, PRASA (SARCC) paid rental for a vacant office property number 66 Jorissen Street, Braamfontein, Johannesburg, for 20 months after vacating it prior to the expiry of its lease agreement and without exercising its option of subletting.
  - c) The hasty vacation of Jorissen's Place Building resulting in continued full payment of rent for unused lettable space for 20 months. This cannot be consistent with the efficiency and cost effective dictates expected in state affairs under section 195 of the Constitution and the standards set for proper handling of public funds under the PFMA, particularly section 51 thereof.
  - d) The actions of PRASA management and its Board regarding the move to Umjantshi House and payment for vacant premises, for about 20 months and failing to mitigate the loss by subletting the premises, amounts to fruitless and wasteful expenditure.
- 22. Regarding PRASA's alleged improper incurring of rental expenditure on Intersite Building after vacating the building 10 months before the expiry of its lease resulting in fruitless and wasteful expenditure:**

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- a) The allegation that PRASA improperly incurred rental expenditure and the consequent fruitless and wasteful expenditure, due to vacating Intersite Building before the expiry of its lease, is substantiated.
  - b) PRASA vacated the Intersite building about 10 months before the lease expiry date and continued with rental payments for the building for the vacant building until the expiry of the lease.
  - c) The conduct of PRASA accordingly constitutes maladministration and improper conduct.

**23. Regarding the GCEO's improper termination of contracts of Executives resulting in fruitless and wasteful expenditure amounting to an estimated R5 million:**

- a) The allegation that Mr Montana improperly terminated the services of 5 of its Executives mentioned in paragraph 6.27.2.1 of this report is substantiated.
- b) Mr Montana terminated the services of five Executives during 2008-2013 without following proper procedure as provided for in paragraph 4.4 of PRASA's Disciplinary Code and Procedure. This resulted in the CCMA overturning some of the terminations and others being settled out of court at cost to PRASA.
- c) PRASA subsequently paid labour dispute settlements amounting to **R3 816 735.32**, principally due to procedural irregularities in the disciplinary steps taken against involved officials, which payments can be said to

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constitute fruitless and wasteful expenditure as envisaged in section 38(1)(c)(ii) of the PFMA.

- d) Failure by PRASA to follow its corporate disciplinary procedures and labour laws relating to procedural fairness constitutes maladministration and improper conduct.

**24. Regarding the GCEO's alleged improper suspension of employees resulting in labour dispute settlements amounting to R3.35 million thus constituting fruitless and wasteful expenditure:**

- a) The allegation that the GCEO suspended employees without following proper disciplinary procedures is substantiated in respect of some of the employees as others were not suspended by him.
- b) PRASA suspended 7 employees without following proper procedure as provided for in the Labour Relations Act and paragraph 11 of its Disciplinary Code and Procedure, leading to loss of approximately of R2 million in wages during their suspension period.
- c) The case studies regarding the seven (7) officials mentioned in paragraph 6.28.2.3 of the report support the conclusion of a pattern of habitual suspensions for periods exceeding thirty(30) days without following proper procedure.
- d) The conduct of PRASA in habitually suspending employees was in contravention of paragraph 11.1 of its Disciplinary Code and Procedure which provides that the employer has the right to suspend an employee with

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pay for a period not exceeding thirty (30) calendar days and also in contravention of paragraph 4.4 of PRASA Disciplinary Code and Procedure and Schedule 1 Part VII of the Basic Conditions of Employment Act which provides that employment practices shall ensure employment fairness.

- e) It is not unreasonable to draw a nexus between the payment of salaries for staff sitting at home with pay for long periods of time and failure to manage employment relations appropriately, and the conclusion that the payment of salaries without any value derived therefrom is irregular and constitutes fruitless and wasteful expenditure.
- f) PRASA's conduct in this regard amounts to fruitless and wasteful expenditure in contravention of the provisions of section 38(1) (c) (ii) read with section 51(b)(ii) of the PFMA while being at odds with the financial prudence and efficiency requirements of section 195 of the Constitution.
- g) The conduct of PRASA regarding improper suspension of employees accordingly constitutes maladministration and improper conduct.

**25. Regarding PRASA Board Chairman, Mr Sfiso Buthelezi's alleged failure to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory services to PRASA on the Rolling Stock Programme:**

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- a) The evidence regarding the allegation that Mr Buthelezi, former Chairman of the PRASA Board, improperly failed to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company alleged to be providing advisory services to PRASA is inconclusive.
  - b) The documents have not been provided by PRASA, whose GCEO only offered an explanation disputing the allegation and providing the names of companies involved in the said advisory services.
  - c) Accordingly, I have deferred my findings on this allegation and will be dealt with in the second report.

**26. Regarding Dr Bridgette Gasas, a PRASA Board member's alleged failure to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company providing consultancy services to PRASA:**

- a) The allegation that the then PRASA Board Member, Dr Bridgette Gasas, failed to disclose and manage a conflict of interest arising from her appointment to the Board while two companies she had an interest in provided services to PRASA, is not substantiated.
- b) Whilst Dr Gasas was indeed a Director at ARUP from 09 February 2011, she made the necessary disclosure to PRASA on 20 July 2011, resigned on 15 May 2012 and when making her disclosure on 10 October 2012, excluded ARUP, as she no longer was a board member.

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- c) ARUP SA (Pty) Ltd was indeed awarded a contract by PRASA for the Park Station Development Framework on 21 June 2011; however the contract was for R3.8 million which would not have required Board approval.

**27. Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, wife of then Board Member, Mr. Bushy Boshielo, as the General Manager of Autopax:**

- a) I have deferred my finding on the alleged nepotism regarding the appointment of Ms Boshielo as PRASA has failed to provide the selection and appointment memoranda and some of the relevant documents.
- b) In its initial response Mr Montana stated on behalf of PRASA that Ms Boshielo was appointed on 06 April 2010 through a headhunting process. Later, in response to the provisional findings, Mr Montana turned around to state that the submission was a mistake as Ms Boshielo was appointed through a recruitment and selection process and was selected from amongst other candidates but repeatedly failed to honour requests to provide the recruitment and selection documents to substantiate the assertion.

**28. Regarding the GCEO's alleged improper appointment of Mr Joel Chimanda at a cost of R2 million as a Special Advisor:**

- a) The allegation that Mr. Montana improperly appointed Mr Chimanda for advisory services is substantiated.

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- b) However, it was Mr. Chimanda's company, AR Chimanda Consulting that was contracted for **R1 999.750.00** on a monthly retainer of **R150 000.00**, which makes the appointment a procurement contract and not an employment contract. As juristic person cannot be an employee, the contract is incapable of being defended under the GGEO's powers to appoint special advisors, as attempted by Mr Montana in his submissions.
  - c) The appointment of Mr. Chimanda's company was not preceded by a competitive bid process, nor is he offering exclusive specialised services entitling him to be the sole provider in terms of the provisions of the PRASA SCM Policy
  - d) The conduct of Mr Montana, in appointing AR Chimanada Consulting, is accordingly in contravention of the SCM policy, the PFMA, PPPFA and section 217 of the Constitution.
  - e) The conduct of Mr Montana accordingly constitutes maladministration and improper conduct.

**29. Regarding PRASA's alleged improper replacement of the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa, without following proper recruitment process:**

- a) The allegation that Mr. Mphefo Ramutloa was improperly appointed in replacement of Group Executive HR by PRASA is not substantiated.

- b) No evidence could be found to support the allegation that Mr. Mphefo Ramutloa is Mr Montana's uncle.

**30. Regarding PRASA's alleged failure to take disciplinary action against staff members allegedly involved in fraudulent Electronic Funds Transfers amounting to R8.1 million:**

- a) The allegation that PRASA failed to take disciplinary action against employees involved in the fraudulent electronic financial transfers of its funds, from its corporate bank accounts, is partially substantiated.
- b) Action was taken against one of the six (6) employees found responsible by a Deloitte forensic investigation, for security lapses that led to the fraudulent electronic transfer of PRASA funds amounting to R8.1million in its KwaZulu Natal and Gauteng bank accounts.
- c) PRASA took action against Ms Pallaiyiah but inexplicably failed to take disciplinary action against the other six individuals recommended for possible disciplinary action as mentioned in paragraph 13.3 of the Deloitte Report of 26 February 2010.
- d) The conduct of Mr Montana regarding failure to take disciplinary action against the other five (5) employees constitutes maladministration and improper conduct.

**31. Regarding Mr Montana's alleged improper taking of a Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000 and possible fruitless and wasteful expenditure:**

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- (a) The evidence regarding this issue is inconclusive. While the photographic evidence received from the Complainant apparently places Mr Montana on the train and a hotel with women companions, he he has denied the allegation but referred to a different trip.
  - (b) I have deferred my finding on this allegation and will be dealt with in the second report.

**32. Regarding Mr Montana's alleged improper transferring of Mr Stephen Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability:**

- a) I have deferred my finding on the alleged failure by Mr Montana to take disciplinary action against Mr Stephen Ngobeni as PRASA has failed to provide the necessary documents relating to the issue.
- b) No evidence was found in support of the allegation that Mr Ngobeni is Mr Montana's cousin.
- c) I have deferred my findings on this allegation and will be dealt with in the second report.

**33. General observations**

- 33.1 The transactions investigated and related findings reveal a culture of systemic failure to comply with the SCM policy, particularly involving failure

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to plan for bulk procurement, test the market appropriately for competitive pricing and to manage contracts, which culture may have cost PRASA millions in avoidable expenditure and preventable disruption of services.

33.2 There also seems to be a culture of either poor information management or hiding of information that could provide evidence of maladministration and other forms of improper conduct. If the pattern is not arrested it has the potential to derail the effective and efficient procurement of goods and services to support PRASA operations and consequently service delivery by this important national asset. Poor financial management also has implications for the national revenue as it may mean frequent yet preventable rescue funding.

33.3 Regarding PRASA's failure to provide information, it must be appreciated that public accountability via administrative bodies such as the Public Protector is not accountable to Complainants but to the public that entrusts public functionaries with public power and resources. It is, accordingly, not open to public functionaries to try and win a case by withholding or hiding information.

(xxiii) The remedial action I take in terms of section 182(1) (c) of the Constitution is to require:

**(a) The Minister of Transport to:**

- 1) Take cognizance of the findings regarding the unethical conduct and maladministration by PRASA relating to the irregularities mentioned in the report.

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- 2) Ensure that the PRASA Board considers the report and, where appropriate, acts in terms of section 84 and as contemplated in section 85 of the PFMA.
  - 3) Ensure that the PRASA Board considers the acts of maladministration and improper conduct referred to in paragraph 8 of this report and takes appropriate disciplinary action against the officials of PRASA in respect of their conduct referred to therein.
  - 4) Include in her oversight activities with regard to PRASA as an State Owned Enterprise, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of powers conferred under section 182(1)(c) of the Constitution.

**(b) The Chairman of PRASA Board to ensure that:**

- 1) The PRASA Board takes cognizance of the findings of maladministration and improper conduct by Mr Montana and other functionaries at PRASA and takes or ensures that appropriate disciplinary action is taken against the responsible officials, where it considers appropriate.
- 2) The PRASA Board evaluates the effectiveness of PRASA's internal controls on Supply Chain Management and Human Resources processes to identify systemic deficiencies with a view to take corrective action to prevent a recurrence of the improprieties referred to in this report.
- 3) The PRASA Board reviews the PRASA SCM Policy regarding the R350 million threshold value for competitive bidding process of procurement of goods and services

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- 4) The PRASA Board reports to the National Treasury and the Auditor-General, particulars of the alleged financial misconduct and the steps taken in connection with such financial misconduct, as contemplated in section 85 of the PFMA.
  - 5) To commission the National Treasury in conducting a forensic investigation into all PRASA contracts above R10 million since 2012 and take measures to address any findings regarding systemic administrative deficiencies allowing ongoing maladministration and related improprieties in its procurement system.

**(c) The Acting GCEO of PRASA:**

- 1) Should ensure that PRASA adopts a monitoring system that ensures that proper procurement processes and HR processes are followed on appointing service providers and individuals.
- 2) To ensure PRASA reviews the existing policy or the policy provisions on managing conflict of interest to ensure there is no confusion regarding expectations from employees and Board Members.
- 3) Together with the Board, review the entire PRASA SCM Policy in particular clause 11.3 of the policy.
- 4) To ensure that prior to signing a formal contract or service level agreement with a contractor must ensure that such contracts or agreements are legally sound to avoid potential litigation and to minimise possible fraud and corruption. This must include legal vetting by at least the Legal Services of the agency. Such contracts or agreements must be actively managed in order to ensure that both the agency and the contractors meet their respective obligations.

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- 5) To ensure that there is compliance with paragraph 11.1 of the Disciplinary Code and Procedure of Metrorail to avoid prolonged and costly suspensions of employees.

**(d) The National Treasury's Chief Procurement Officer:**

- 1) In consultation with the PRASA Board, consider commissioning a forensic investigation on all PRASA contracts or tenders valued above R10 000 000.00 issued between 1 April 2012 and 30 June 2015.
- 2) The terms of reference to be approved by the Public Protector and to include a forensic examination of all suspected or alleged corrupt relationships.
- 3) The Public Protector to be kept abreast of the progress of the investigation and favoured with the final report.

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**LIST OF ACRONYMS**

<b>ADV</b>	<b>Advocate</b>
<b>CEO</b>	<b>Chief Executive Officer</b>
<b>CFO</b>	<b>Chief Financial Officer</b>
<b>Constitution</b>	<b>The Constitution of the Republic of South Africa No. 108 1996</b>
<b>Crowie</b>	<b>Crowie Projects (Pty) Ltd</b>
<b>Email</b>	<b>Electronic Mail</b>
<b>EXCO</b>	<b>Executive Council</b>
<b>GCEO</b>	<b>Group Chief Executive Officer</b>
<b>HOD</b>	<b>Head of Department</b>
<b>Makhubela</b>	<b>Makhubela Attorneys</b>
<b>NTM</b>	<b>National Transport Movement</b>
<b>PFMA</b>	<b>Public Finance Management Act No. 1 of 1999</b>
<b>PRASA</b>	<b>Passenger Rail Agency Of South Africa</b>
<b>RTPC</b>	<b>Regional Tender Procurement Committee</b>
<b>SARCC</b>	<b>South African Rail Commuters Corporation</b>
<b>SATAWU</b>	<b>South African Transport And Allied Workers Union</b>
<b>SC</b>	<b>Senior Counsel</b>
<b>SCM</b>	<b>Supply Chain Management</b>
<b>The Board</b>	<b>The Board of PRASA</b>
<b>Treasury Regulations</b>	<b>The Treasury Regulations and instructions for departments, trading entities, constitutional institutions and public entities, issued in terms the Public Finance Management, 1999</b>

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## REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF FINANCIAL MISMANAGEMENT TENDER IRREGULARITIES IRREGULAR APPOINTMENTS AND MALADMINISTRATION LEVELLED AGAINST PRASA

### 1. INTRODUCTION

- 1.1. "Derailed" is my report as the Public Protector issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) read with section 8(1) of the Public Protector Act 23 of 1994 following an investigation into 37 complaints alleging maladministration principally involving procurement irregularities, financial mismanagement, conflict of interest, and human resources mismanagement, incorporating the victimization of whistle blowers, launched principally against the PRASA GCEO, Mr Lucky Montana by the South African Transport Workers Union and subsequently pursued by the National Transport Movement (NTM), both of which are trade unions involved in the transport sector.
- 1.2. PRASA is an important and, I believe, strategic organ of state. Its handling of public finances and procurement of goods and services has implications for efficient and effective public transport delivery in compliance with section 195 of the Constitution. As a public infrastructure provider, PRASA also has implications for the economy. A state owned enterprise with an estimated total net value of assets over as at 2010/2011 **R19 billion**, PRASA is an organ of state listed as a National Government Business Enterprise in terms of Schedule 3B of the Public Finance Management Act 1 of 1999 (PFMA). PRASA has four subsidiaries, namely: **Metrorail**, operating commuter rail services in urban areas; **Shosholoza Meyl** operating regional and intercity rail services; **Autopax**, operating regional and intercity coach services; and **Intersite**, managing the corporate property

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portfolio. PRASA reported an accumulated loss of **R4.4 billion** for 2010/12 financial year.

- 1.3. PRASA reported an accumulated loss of **R1 billion** for 2014/2015 financial year. The budget allocation from Government for PRASA for the MTEF period 2015/2016 to 2017/2018 is **R17.2 billion**. The 37 cases reported by the Complainant mostly deal with alleged procurement irregularities with the amount involved being more than **R2.8 billion**. As the report was being finalized further allegations of procurement irregularities at PRASA were reported.
- 1.4. PRASA is controlled by a PRASA Board of Control (PRASA Board), chaired by a non-executive chairman, and which in terms of section 49(2) (b) of the PFMA is its Accounting Authority. The Group Chief Executive Officer (GCEO) has delegated authority in terms of PRASA's Powers and Authority of the PRASA Board and Delegation of Authority.
- 1.5. At the time the report was being finalised, more complaints against PRASA regarding tender irregularities, financial mismanagement, cronyism and corruption were brought to my attention however these came too late to be investigated and incorporated in this report. These complaints will be dealt with in volume 2 of this report.
- 1.6. The report is submitted in terms of section 8(1) of the Public Protector Act 23 of 1994, to the following persons:
  - 1.6.1. The Chairman of PRASA Board, Dr P Molefe;
  - 1.6.2. The former Group Chief Executive Officer (GCEO) of Passenger Rail Agency of South Africa (PRASA) Mr. Tshepo Lucky Montana;

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1.7. Copies of the report are also circulated to:

- 1.7.1. The Complainant, the National Transport Movement;
- 1.7.2. Mr. Craig Nte, General Secretary of the National Transport Movement;
- 1.7.3. Minister of Transport, Ms Dipuo Peters;
- 1.7.4. The Auditor General of South Africa, Mr Thembekile Kimi Makwetu; and
- 1.7.5. The Chief Procurement Office of the National Treasury, Mr Kenneth Brown.

## **2. THE COMPLAINT**

2.1. A list of complaints was lodged with this office by the Executive Committee (Exco) of the South African Transport and Allied Workers Union (SATAWU) led by its then President, Mr Ephraim Mphahlele and General Secretary, Mr Craig Nte, in March 2012. When SATAWU inexplicably withdrew its complaints, Exco of the National Transport Movement (NTM), apparently a splinter union from SATAWU whose Exco members were part of the SATAWU representatives who lodged the complaints, hereinafter referred to as the Complainant, subsequently requested the continuation of the investigation. The essence of the complaints, which ended up being 37 principally levelled against PRASA management, in particular its Group Chief Executive Officer (GCEO), Mr Lucky Montana, was allegations of financial mismanagement, procurement irregularities, unmanaged conflict of interest, nepotism/cronyism/corruption, irregular appointments and maladministration. About 17 tenders/contracts collectively exceeding R2.8 billion were specifically identified by the Complainant for investigation of supply chain irregularities, including non-competitive processes, cronyism, scope creep, cost overruns, overpayment and fruitless and wasteful expenditure.

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2.2. I must indicate upfront that SATAWU's attempt to withdraw its complaint is discomfoting particularly because PRASA management was initially reluctant to cooperate using the withdrawal as justification. Allegations of victimisation of whistle-blowers, though not yet adjudicated, do add to the concern. There is an indication, for example, that Mr Nte may have suffered an occupational detriment after the lodging of this complaint in that Mr Nte.

2.3. The following provides an overview of allegations made by the Complainant against PRASA management:

**Procurement irregularities**

2.3.1. The Complainant alleged that:

2.3.1.1. On 15 March 2012, PRASA allegedly terminated all contracts for cleaning services irregularly and irregularly appointed Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services on a contract valued above the R500 000 thresholds without advertising and in contravention of the Treasury Regulations and Supply Chain Management Policies.

2.3.1.2. Reakgona Commercial and Industry Hygiene were irregularly awarded the contract due to its association with GCEO's closest business associate, Mr. Isaac Modiselle.

2.3.1.3. PRASA allegedly irregularly awarded a tender No 525/2010/GAU/PS to Sidas Security Company improperly at a higher rate to replace National Force Security on the GCEO's instructions but terminated the contract 9 months later after its appointment.

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- 2.3.1.4. Proper procurement processes were not followed in the appointment of Vimtsire Security Services, which allegedly failed to meet the minimum requirements for appointment.
- 2.3.1.5. Royal Security was allegedly appointed on the same tender in 2009 and allegedly billed PRASA R2.8 million instead of the agreed amount of R2 5 million per month; and The appointment of Royal Security on the tender concerned was irregular, as its original contract WV/FIN/CA/7/24/06 was terminated by PRASA due to its underperformance.
- 2.3.1.6. An amount of R600 000, alleged to have been improperly authorised by the PRASA Head: Corporate Services, was improperly paid to Enlightened Security for a contract for the Tshwane Region prior to its appointment on tender TOSH/RISK/436/10/2008.
- 2.3.1.7. The scope of a Dark Fibre and Integrated Communication Systems tender amounting to R 800 million awarded to Siemens was irregularly extended nationally during the financial year 2009/2010 without proper tender advertisement being followed.
- 2.3.1.8. A tender for the installation of high speed passenger gates worth R800 million was awarded to a certain contractor in 2009/2010 for the Doornfontein station but was later irregularly extended to other stations nationally without following proper tender processes.
- 2.3.1.9. PRASA improperly incurred an upfront payment to a developer of the City Mall for the construction of an underground train station (Bridge City Project) without

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going on a bidding process and without proper authorisation during the periods 2008 to 2010.

- 2.3.1.10. PRASA allegedly appointed a contractor irregularly for *Hambanathi Magazine* without following proper procurement processes during 2008/2009.
- 2.3.1.11. PRASA Board member, Mr Vusi Twala, was irregularly awarded a tender by Intersite, a subsidiary of PRASA to provide CCTV cameras.
- 2.3.1.12. Change Management Consultant, Mr Ezra Ndwandwe was appointed at a cost of R 10 million without following proper procurement processes during 2008/2009.
- 2.3.1.13. During 2009, the GCEO irregularly awarded a tender amounting to an estimated R 10 million to the erstwhile Chief Executive Officer (CEO) of the South African Rail Commuters Corporation (SAC), Mr Eddie Lekota for the development of a contingency emergency preparedness programme for Metrorail without following proper procurement processes.
- 2.3.1.14. Umjanji Media Consortium, a company formed and incorporated after the closing date for submission of tenders on tender HO/CA/739/02/2010, was irregularly awarded a tender on Media Advertising and Broadcasting Concession Agreement in March 2011 without following proper procurement processes in contravention of the PRASA Supply Chain Management Policies.
- 2.3.1.15. The GCEO irregularly awarded a contract for the provision of professional advisory service on the signalling project to his friend, Mr Makena Mabunda

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(who is associated with Siyaya DB), who did not possess the necessary skills and experience and without following proper procurement processes.

- 2.3.1.16. A tender amounting to R 22 million for the Park Station Development Framework was not advertised but recommended to be awarded to a contractor named ARUP, which is associated with a certain member of the PRASA Board, during November 2009.
- 2.3.1.17. Between the years 2008 and 2010, PRASA engaged construction companies in the 2010 Soccer World Cup Station Building Project, the Capex Project and renovation of existing stations without following proper procurement processes. An overspending of R 2 billion amounting to fruitless and wasteful expenditure was allegedly incurred in addition to the budgeted amount of R 3 billion.
- 2.3.1.18. During January 2010, Autopax, a subsidiary of PRASA, lost buses during theft and management failed to pursue an investigation into the matter but instead replaced the buses at a cost of R2. 8 million.
- 2.3.1.19. In April 2010, Autopax concluded an irregular security contract with Futuris Guarding (PTY) amounting to R54 337.20 per month.
- 2.3.1.20. It is alleged that PRASA was delaying to pay Rasakanya Builders, the service provider to PRASA Corporate Real Estate Solutions (PRASA Cres) and irregularly served a notice of termination of the contract, thereby leaving 36 employees of Rasakanya Builders without payment for services rendered.
- 2.3.1.21. The GCEO/PRASA incurred irregular and/or fruitless and wasteful expenditures relating to the following transactions:

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- i Payment of an amount of R80 million upfront for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds which resulted in fruitless and wasteful expenditure
  - ii PRASA invested funds with FIFA based on the agreement that PRASA would recoup the expenditure through the sales of tickets to commuters/soccer fans and it is asserted that the money was never recovered.
  - iii Brand Leadership was awarded a new PRASA branding contract to the value of R 9 million. However the contract amount was alleged to have been improperly inflated to R19 million, thereby resulting in irregular/fruitless and wasteful expenditure of R10 million.
  - iv During the period 2009/2010, the GCEO requested R 1 billion funds from the National Treasury on the pretext that it would be used during the taking over of operations of Shosholoza Meyl. National Treasury paid R 500 million but the funds were never used for their intended purpose.
  - v PRASA operational expenditure (OPEX) budget was irregularly overspent by R2.2 billion without the approval of the PRASA Board during the period 2009/2010.
  - vi PRASA Head Office staff vacated its Offices at Jorissen Place 14 months before the expiry of the lease agreement but PRASA continued to pay rental, which constituted a fruitless and wasteful expenditure.

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- vii After vacating Jorissen Place, PRASA acquired Umjantshi House Building to accommodate its Head Office staff without following proper procurement processes and without a proper budget approval.
  - viii The GCEO instructed PRASA Management at Intersite Building in Woodmead to vacate the premises 20 months prior to the expiry of the lease agreement, but continued to pay for the lease, thereby incurring fruitless and wasteful expenditure.
  - ix The GCEO dismissed five Senior Executives unlawfully during the years 2008 and 2011 and the CCMA ordered their reinstatement, which the GCEO rejected and instead compensated them with an estimated R 5 million, resulting in fruitless and wasteful expenditure.
  - x Group Executive HR was allegedly replaced improperly by the GCEO's uncle, Mr Mphefo Ramutloa, without proper processes being followed.
  - xi During February 2010, unlawful electronic funds transfer was uncovered in a forensic report by Deloitte, in which R8.1 million was fraudulently transferred in the Durban and Tshwane Regions but no action was taken against those implicated in the transactions.
  - xii During the period 24 to 27 September 2009, the GCEO undertook a leisure trip in a Blue Train to Cape Town together with 10 female companions for free and returned in a South African Airways (SAA) flight costing PRASA R17 000. The total cost of the trip was allegedly an estimated R170 000.00 which constituted fruitless and wasteful expenditure.

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- xiii During 2008/2009, the Executive Corporate Affairs Manager, Mr P Mabe, received salaries from PRASA despite having left its service and you allegedly misled the Exco and the PRASA Board of Directors (PRASA Board) that the employee was not on PRASA's payroll.

### **Labour relations irregularities**

- 2.3.2. The Complainant alleged that PRASA disregards the labour relations processes and conditions of employment when dealing with labour issues thereby costing the entity enormous amount of money that results in fruitless and wasteful expenditure. To this end it is alleged that:
- 2.3.2.1. Mr Stephen Ngobeni, a cousin to the GCEO in the employment of PRASA, improperly appointed a Training Contractor to provide training services on the handling of People with Disability. He was irregularly transferred without disciplinary process being instituted against him.
- 2.3.2.2. The GCEO unlawfully engaged, yearly, in series of suspending employees perpetually with payment of salaries costing PRASA an estimated R3.35 million in fruitless and wasteful expenditure.
- 2.3.2.3. Whistle-blowers are persecuted, with some having been unduly suspended or dismissed in violation of prescribed procedures.

### **Conflict of interest**

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- 2.3.3. The Complainant alleges failure to disclose and manage conflict of interest, by the following members of the PRASA Board, specific allegations being that:
- 2.3.3.1. Member of the PRASA Board of Directors of PRASA (PRASA Board), Ms Bridgette Gasa, who is also a Director of ARUP, a company alleged to be contracted to provide advisory services to PRASA, and a Director in another company that is also providing consultancy services to PRASA, is benefiting improperly as her involvement in these companies while serving as a member of the PRASA Board constitutes a conflict of interests.
- 2.3.3.2. Chairperson of the PRASA Board, at the time, Mr Sfiso Buthelezi is the Chief Executive Officer of Makana, a subsidiary of Cadaz, a company providing advisory service to PRASA on the Rolling Stock Recapitalisation Project, which constitutes a conflict of interest.
- 2.3.3.3. The wife of Mr Bushy Boshielo, was appointed as a General Manager of Autopax without following proper recruitment processes during Mr Boshielo's time as a PRASA Board member.
- 2.3.3.4. During 2008/2009, the GCEO irregularly appointed Mr Joel Chimanda as a Special Advisor at PRASA's cost of R2 million, without following proper recruitment processes and in contravention of the PRASA Recruitment Policy.
- 2.4. SATAWU's attempt to withdraw of its complaint raises a lot of questions, particularly because PRASA Management was initially reluctant to cooperate. After giving this office a run-around regarding information and documents requested, Mr Montana, asked at the meeting held with him and his team following a subpoena, advised that he did not understand why the investigation was continuing given the

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fact that SATAWU had withdrawn its complaint. Allegations of victimisation of whistle-blowers, though not yet adjudicated, do add to the concern. He was advised that the office has the constitutional and statutory power to investigate without a complaint and that NTM had taken the matter forward.

2.5. An allegation has been made by SATAWU that pressure was applied including harassment. I have not adjudicated these allegations. However, there is an indication, for example, that Mr Craig Nte may have suffered an occupational detriment after whistle-blowing, while a member of the executive of SATAWU, which was later deposed followed by SATAWU's inexplicable attempt to withdraw the matter. His matter is dealt with in the part of this report dealing with Human Resources (HR) Complaints relating to arbitrary suspensions and dismissals.

2.6. The complaints were lodged in terms of section 182 of the Constitution and the Public Protector Act.

### 3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1. The Public Protector is an independent constitutional institution established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2. Section 182(1) of the Constitution provides that:

*"The Public Protector has the power, as regulated by national legislation-*

- (a) *to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*

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- (b) *to report on that conduct; and*
  - (c) *to take appropriate remedial action."*

- 3.3. The Public Protector's powers are regulated and amplified by the Public Protector Act, 23 of 1994 which states, among others, that the Public Protector has the power to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as to subpoena persons and information in from any person in the republic for the purposes of an investigation. The subpoena powers were employed in respect of PRASA, when requests for information and documents were not being met by Mr Montana and his management team. When I finally met with Mr Montana and his team, he enquired as to why the investigation was proceeding as SATAWU had withdrawn it, whereupon he was advised of this office's power to investigate mero motu and that NTM had since picked up the baton.
- 3.4. PRASA is a public entity and the complaints lodged against it relate to maladministration and improper conduct in state affairs and as a result this matter falls within my ambit.
- 3.5. The jurisdiction and power to investigate was not disputed by any of the parties. However, I must indicate that it was difficult to get information from PRASA, with this being a main causal factor behind the delay in finalising this investigation which was lodged in 2012. Promises for documents were not kept and even a request for assistance from the Board yielded very few source documents. It was also discomfoting that Mr Montana boasted about the failure of complainants to provide documentary evidence on some of the allegations and asked that I

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adjudicate those matters in his favour when he failed to provide legitimately requested documents. In this regard it must be appreciated that public accountability via administrative bodies such as the public Protector is not accountability to complainants but to the Public as the sovereign that entrusts public functionaries with public power and resources. It is not open to public functionaries accordingly, to try and win a case by withholding or hiding information.

- 3.6. Mr Montana's response to the provisional findings was however, deeply encouraging. He said in part:

*"We confirm that PRASA welcomes the Provisional Report and the remedial action recommended by the Public Protector. PRASA views the Remedial Actions concerned as an essential tool to assist it in improving its internal administrative and financial controls. PRASA believes that the remedial actions will in future, strengthen its governance framework, operations and internal controls in ensuring that PRASA is safeguarded against irregular or unlawful conduct within its organisation."*

- 3.7. The PRASA Board's assurance's at our meeting on 30 June 2015, is a further source of comfort. Not only did the Board support and undertake to cooperate on the investigation and its outcomes, it indicated that it was also seized with an internal processes of reviewing corporate procurement management and related matters. The Board also confided that it too had picked up worrying patterns and had began the process of implementing measures to minimise systemic administrative deficiencies enabling and masking procurement irregularities.

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## **4. THE INVESTIGATION**

### **4.1. Methodology**

4.1.1. The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.2. The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to investigate and report her findings regarding any complaint lodged.

### **4.2. Approach to the investigation**

4.2.1. Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

- a) What happened?
- b) What should have happened?
- c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration or other improper conduct?
- d) In the event of maladministration or improper conduct, what would it take to remedy the wrong or to right the wrong occasioned by the said maladministration or improper conduct?

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- 4.2.2. The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the GCEO and other PRASA functionaries acted in the manner alleged by the Complainant. The sources of evidence principally included institutional documents such as bid documents, memoranda, minutes and copies of correspondence. Viva voce evidence was received from selected witnesses, mainly the Complainant, PRASA management, the former board and the current board during meetings and or interviews. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.
- 4.2.3. It is important to note that the GCEO was concerned that he was being asked to provide evidence instead of the Complainant. Administrative oversight investigations are not criminal proceedings but an accountability forum for persons entrusted with public power. In the *Public Protector Versus Mail and Guardian*, 2011(4) SA 420 (SCA), the Supreme Court of Appeal made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.
- 4.2.4. The enquiry regarding what should have happened, focuses on the law or rules that regulate the standard that should have been met or complied with by PRASA to prevent maladministration and prejudice. In this case, key reliance was placed on PRASA's comprehensive SCM Policy, in addition to national laws, policies and guidelines. This office's own institutional touchstones, being principles from previous reports, are always, and were also taken into account.

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- 4.2.5. The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration. Where a Complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the organ of state complied with the regulatory framework setting the applicable standards for good administration. In the case of conduct failure as was the case in the complaints investigated, remedial action seeks to right or correct identified wrongs while addressing any systemic administrative deficiencies that may be enabling or exacerbating identified maladministration or improper conduct.
- 4.2.6. The substantive scope of the investigation focused on compliance with the law and prescripts regarding the awarding of tenders, appointment of staff and service providers, and termination of contracts as well as generally accepted accountability practices for the period not exceeding 2012.
- 4.2.7. Due to the lack of resources, the delays in the investigation and other challenges referred to in this report, it was not possible to investigate all the allegations and suspicion of impropriety that were raised by the Complainant and other sources of information. It was also not possible to subject some of the allegations, particularly those alleging cronyism and nepotism, to a forensic test. This impediment was compounded by the failure by PRASA to provide requested information and evidence expeditiously.
- 4.3. On analysis of the complaint and allegations, the following issues were considered and investigated:**
- 4.3.1. Did PRASA improperly extend to other stations nationally, a tender for the installation of high speed passenger gates worth R 800 million to Siyangena

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Technologies in 2009/2010 for the Doornfontein station which was later extended to other stations nationally?

- 4.3.2. Did PRASA improperly extend the appointment of Siemens for the Dark Fibre and Integrated Communication Systems tender amounting to R800 million to other stations nationally, during the financial year 2009/2010 when it was only advertised in Gauteng?
- 4.3.3. Did PRASA improperly terminate all contracts for cleaning services and was the subsequent appointment of Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services improper?
- 4.3.4. Did PRASA improperly appoint Sidas Security on a security tender in replacement of National Force Security on the GCEO's instruction?
- 4.3.5. Did PRASA improperly appoint of Vimtsire Security Services, which failed to meet the minimum requirements for appointment on tender number 525/2010/GAU/PS
- 4.3.6. Did PRASA improperly appoint and pay Royal Security R2.8 million instead of R2.5 million for security services?
- 4.3.7. Did PRASA improperly advance a payment of R600.000.00 to Enlightened Security?
- 4.3.8. Did PRASA improperly appoint a media company to produce *Hambanathi Magazine* during 2008/2009?

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- 4.3.9. Did PRASA improperly appoint Mr Ezra Ndwandwe, on a Change Management Consultancy at a cost of R2 million in 2008/2009?
- 4.3.10. Did PRASA improperly increase the scope and value of marketing and communications tender number HO/M&C/305/07/2009 awarded to Brand Leadership for R29 million?
- 4.3.11. Did the GCEO improperly appoint Mr Edwin Lekota on a tender amounting to R10 million for the development of a Contingency Emergency Preparedness Programme for Metrorail?
- 4.3.12. Did PRASA improperly award a tender to Umjanji Consortium, for the media, advertising and broadcasting concession agreement?
- 4.3.13. Did the GCEO improperly award a contract for the provision of professional advisory service on the signalling project to a friend, Mr Makhensa Mabunda of Siyaya DB, who did not possess the necessary skills and experience and without following proper procurement processes?
- 4.3.14. Did PRASA improperly award a tender in the amount of R22 million for Park Station Development Framework to ARUP, a company associated with its board member?
- 4.3.15. Did PRASA improperly fail to investigate the theft of the buses of its subsidiary, Autopax?
- 4.3.16. Did PRASA improperly award a security services contract to Futuris Guarding in April 2010 at Autopax City to City for a total amount of R231 204.00?

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- 4.3.17. Did PRASA improperly terminate the Rasakanya Builders contract on 1 November 2012?
- 4.3.18. Did the GCEO/PRASA improperly implement an upfront payment in the amount of R 80 million for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds thus constituting to fruitless and wasteful expenditure?
- 4.3.19. Did PRASA improperly incur an over expenditure of R2.2 billion on PRASA's operations budget in 2009/2010 financial year?
- 4.3.20. Did PRASA fail to spend a subsidy of R500 million received for Shosholozza Meyl for the 2009/2010 period and not use it for its intended purpose?
- 4.3.21. Did PRASA incur rental expenditure for Jorissen Building after vacating it 20 months before the expiry of its lease resulting in fruitless and wasteful expenditure?
- 4.3.22. Did PRASA improperly incur rental expenditure on Intersite Building after vacating the building 10 months before the expiry of its lease resulting in fruitless and wasteful expenditure?
- 4.3.23. Did the GCEO improperly terminate contracts of Executives resulting in fruitless and wasteful expenditure amounting to an estimated R5 million?
- 4.3.24. Did the GCEO improperly suspend employees resulting in labour dispute settlements amounting to R3.35 million thus constituting fruitless and wasteful expenditure?

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- 4.3.25. Did PRASA Board Chairman, Mr Sfiso Buthelezi, improperly fail to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory services to PRASA on the Rolling Stock Programme?
- 4.3.26. Did Dr Bridgette Gasa, a PRASA Board member improperly fail to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company providing consultancy services to PRASA?
- 4.3.27. Did the GCEO improperly appoint Mr Joel Chimanda at a cost of R2 million as a Special Advisor?
- 4.3.28. Did PRASA improperly replace the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa without following proper recruitment process?
- 4.3.29. Did PRASA improperly fail to take disciplinary action against staff members allegedly involved in fraudulent Electronic Funds Transfers amounting to R8.1 million?
- 4.3.30. Did Mr. Montana improperly transfer Mr Stephen Ngobeni without disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability thereby amounting to maladministration?

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**4.4. The following issues will be dealt with in volume 2 of this report:**

- 4.4.1. Did PRASA improperly implement an upfront payment to a developer of the City Mall for the construction of an underground train station in the Bridge City Project without proper authorisation during the period 2008 to 2010?
- 4.4.2. Did PRASA improperly award a CCTV cameras tender to Mr Vusi Twala, who was a board member at the time?
- 4.4.3. Did PRASA improperly engage various construction companies in respect of 2010 Soccer World Cup projects?
- 4.4.4. Did PRASA improperly procure Umjantshi House from Transnet in September 2009?
- 4.4.5. Did PRASA improperly appoint Ms Shiela Boshielo, the wife of former PRASA Board Member, Mr. Bushy Boshielo, as the General Manager of Autopax?
- 4.4.6. Did PRASA's GCEO improperly take a Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000 and did such amount to fruitless and wasteful expenditure?
- 4.4.7. Did PRASA improperly pay a salary to Mr Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure?

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#### 4.5. Key Sources of information

##### 4.5.1. Documents

4.5.1.1. An undated extract of the PRASA supplier database.

**Documents relating to extension of the tender for the installation of high speed passenger gates to Siyangena Technologies in 2009/2010**

4.5.1.2. A copy of the advertisement for tender no. SG/Gates/003/2009

4.5.1.3. Letter from Miss Mosholi, Manager Procurement dated 04 November 2010.

4.5.1.4. Minutes of the Tender Evaluation Committee dated 13 and 14 December 2010.

4.5.1.5. PRASA Board resolution dated 14 February 2011.

4.5.1.6. Agreement between PRASA & Siyangena Technologies in relation to tender no. SG/Gates/003/2009;

4.5.1.7. Agreement between the Main Contractor & PRASA for the 7 stations Cape Town, Rhodesfield, Windermere, Langa, Bridgette City, Moses Mabhida and Orlando;

4.5.1.8. Termination letter against the Main Contractor;

4.5.1.9. Approved Submission to extend the mandate of Siyangena to the 71 stations;

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- 4.5.1.10. Tender records in relation to the closed tender for the installation of speed gates project i.e. Acquisition records, BEC & BAC reports, Appointment letter etc.;
  - 4.5.1.11. Unsigned letter dated 4 November 2010;
  - 4.5.1.12. Undated and unsigned Submission for Adjudication;
  - 4.5.1.13. Minutes of meeting held on 13 and 14 December 2010;
  - 4.5.1.14. CTPC document dated 14 February 2011 signed 20 February 2011;
  - 4.5.1.15. Letter from Siyangena Technologies to PRASA dated 28 March 2011; and
  - 4.5.1.16. Agreement between PRASA & Siyangena for the installation of speed gates.

**Documents relating to the extension of Siemens for the Dark Fibre and Integrated Communication Systems tender**

- 4.5.1.17. Tender advertisement, dated 6 February 2009, for tender number HO/SIGNALS/02/2009/WT1802 relating to Design, Construction and Implementation of a new Railway Signalling system nationally;
- 4.5.1.18. Request for proposal relating to tender for Design, Construction and Implementation of a new Railway Signalling system nationally;
- 4.5.1.19. Attendance register for a briefing session relating to tender number HO/SIGNALS/02/2009;

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- 4.5.1.20. Agreement between PRASA & Siemens relating to tender for “THE DESIGN, SUPPLY AND INSTALLATION OF THE INTEGRATED COMMUNICATIONS SYSTEMS (ICS) IN WITS (WT81201), TSHWANE (PR81081), DURBAN (DB 82101) AND CAPE TOWN (CA 82901)”;
- 4.5.1.21. Acceptance letter by Siemens, dated 19 December 2008, relating to tender for “THE DESIGN, SUPPLY AND INSTALLATION OF THE INTEGRATED COMMUNICATIONS SYSTEMS (ICS) IN WITS (WT81201), TSHWANE (PR81081), DURBAN (DB 82101) AND CAPE TOWN (CA 82901)”;
- 4.5.1.22. Specifications relating to tender for “THE DESIGN, SUPPLY AND INSTALLATION OF THE INTEGRATED COMMUNICATIONS SYSTEMS (ICS) IN WITS (WT81201), TSHWANE (PR81081), DURBAN (DB 82101) AND CAPE TOWN (CA 82901)”.
- 4.5.1.23. Undated submission for turnaround strategy 2010 Projects;
- 4.5.1.24. Email correspondence dated 31 May 2007 from Miss Matshidiso Mosholi;
- 4.5.1.25. TPC document signed on 22 April 2008;
- 4.5.1.26. Undated tender recommendation report;
- 4.5.1.27. Undated memorandum for the Durban and Cape Town Regions;
- 4.5.1.28. Undated recommendation report;
- 4.5.1.29. Undated recommendation report dealing with the Extension.

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**Documents relating to the termination of all contracts for cleaning services and the subsequent appointment of Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services**

- 4.5.1.30. An unsigned letter dated 01 November 2005 from B Mazibuko Acting Regional Manager to Dyno Cleaning;
- 4.5.1.31. A letter dated 22 November 2005 from Mr B Mazibuko Acting Regional Manager to Dyno cleaning;
- 4.5.1.32. A contract between Intersite Property Management Services and Dyno Cleaning Services signed on 29 November 2005;
- 4.5.1.33. A contract between Intersite Property Management Services and Dyno Cleaning Services dated 01 December 2004;
- 4.5.1.34. A contract between Intersite Property Management Services and Dyno Cleaning Services dated 02 December 2004;
- 4.5.1.35. Contract extension letter dated 07 November 2006 from Mr K Vallabh Senior Regional Manager addressed to Dyno Cleaning;
- 4.5.1.36. Extension letter dated 10 November 2006 from Mr K Vallabh Regional Manager addressed to Dyno Cleaning;
- 4.5.1.37. Termination letters (7) (seven) dated 14 March 2012 for different service providers;

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- 4.5.1.38. A motivation of emergency letter dated 29 March 2012;
  - 4.5.1.39. Appointment letter dated 23 April 2012 issued to Reakgona Commercial and Industry Hygiene;
  - 4.5.1.40. Contract between Reakgona Commercial and Industry Hygiene and PRASA signed on 15 April and 16 April 2012;
  - 4.5.1.41. Quotation dated 23 March 2012 from Katanga Cleaning Services;
  - 4.5.1.42. Quotation from Katanga Cleaning Services dated 28 March 2012;
  - 4.5.1.43. A letter of Appointment issued to Katanga Cleaning Services dated 23 April 2012;
  - 4.5.1.44. An undated and unsigned specifications letter which appears to have been submitted by Katanga Cleaning Service;
  - 4.5.1.45. A letter of appointment dated 23 April 2012 issued to Katanga Cleaning Services;
  - 4.5.1.46. Contracts between PRASA and Katanga Cleaning Services signed on 10 April, 16 April 2012 and 8 November 2012;
  - 4.5.1.47. Directorship search conducted for Mr Isaac Modiselle

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**Documents relating to the appointment of Sidas Security on a security tender in replacement of National Force Security**

- 4.5.1.48. An unsigned submission for the replacement of National Force Security in the Gauteng South Region dated 15 April 2009;
- 4.5.1.49. An investigation report dated 21 July 2009 was obtained from the investigation team to the Head of Corporate Security Services;
- 4.5.1.50. A cancellation letter dated 31 August 2009 for Sidas Security contract addressed to Sidas Security;
- 4.5.1.51. A termination letter dated 31 August 2009 in respect of Sidas Security contract;
- 4.5.1.52. A copy of memorandum from Mr Stephen Nkhuna to Mr N Sangweni dated 09 February 2010, regarding termination of security contracts;
- 4.5.1.53. A memorandum from Mr Joe Buthelezi to National Force Security Services dated 10 February 2010.
- 4.5.1.54. Procedures on tender 525/2010/GAU/PS
- 4.5.1.55. An undated and unsigned submission for adjudication document for tender number 525/2010/GAU/PS;
- 4.5.1.56. An e-mail dated 16 March 2010 from Mr Nhlanganiso Vokozela addressed to Mr Ronnie Khumalo;

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- 4.5.1.57. E-mail dated 19 March 2010 from Mr Joey Van Eden to Mr Joe Buthelezi;
- 4.5.1.58. Unsigned letter from Mr RM Khumalo Acting Regional Security Manager to Ms N Sangweni Regional Manager dated 20 July 2010;
- 4.5.1.59. A copy of letter of proceed dated 03 March 2010 for Changing Tides;
- 4.5.1.60. An e-mail correspondence dated 04 August 2010 from Kabelo Mantsane to Nozipho Sangweni, Mr Ronnie Mzwandile Khumalo;
- 4.5.1.61. An e-mail correspondence dated 6 August 2010 from Ronnie Mzwandile Khumalo to Nozipho Sangweni;
- 4.5.1.62. Email dated 6 August 2010 from Nozipho Sangweni addressed to Mr Ronnie Mzwandile Khumalo, Kabelo Mantsane;
- 4.5.1.63. Email from Craig Nte dated 12 August 2010 addressed to Ronnie Mzwandile Khumalo;
- 4.5.1.64. A realignment and extension of security contracts letter dated 26 August 2010 signed by Mr Kabelo Mantsane;
- 4.5.1.65. Undated document titled "tender for provisions of various security services";
- 4.5.1.66. Contract between PRASA and Vimtsire Security Services dated 23 February and 29 May 2010;

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- 4.5.1.67. Contract between PRASA and Enlightened Security 23 February and 21 May 2010;
- 4.5.1.68. Notice to proceed letters dated 03 March 2010;
- 4.5.1.69. Email correspondence dated 09 March 2010 from Mr Dumisani Xolelo to Mr Joe Buthelezi;
- 4.5.1.70. Email correspondence dated 11 March 2010 from Miss Yvonne Mokotedi to Mr Shumi Gorata Mokotedi;
- 4.5.1.71. Email correspondence dated 16 March 2010 from Mr Nhlanganiso Vokozela to Mr Ronnie Khumalo;
- 4.5.1.72. Email correspondence dated 19 March 2010 from Mr Joey Van Eden to Mr Joe Buthelezi and Ms Yvonne Moetsela;
- 4.5.1.73. Unsigned letter dated 20 July 2010 from Mr Ronnie Khumalo to Ms Nozipho Sangweni.

**Documents relating to the appointment of Vimtsire Security Services**

- 4.5.1.74. An undated notice to Tenderers, with a tender number 525/2010/GAU/PS;
- 4.5.1.75. Undated minutes resolutions;
- 4.5.1.76. An undated and incomplete submission for adjudication document for tender number 525/2010/GAU/PS;

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- 4.5.1.77. Notice to proceed letter dated 3 March 2010;
  - 4.5.1.78. Contract between PRASA and Vimtsire Security Services dated 23 February 2010;
  - 4.5.1.79. Submission to extend contract validity dated 12 March 2013;
  - 4.5.1.80. Extension letter dated 13 May 2013.

**Documents relating to the payment to Royal Security**

- 4.5.1.81. An extension of contract document for Royal Security dated 15 January 2011;
- 4.5.1.82. Undated responds which prepared by Mr Abel Baloyi addressed to Royal Security;
- 4.5.1.83. Tax invoice from Royal Security dated 28 February 2011;
- 4.5.1.84. An undated remittance advice amounting to R 5,005,323.41 in respect of Royal Security;
- 4.5.1.85. A letter of correspondence to finance from Mr Abel Baloyi which was signed on 11 April 2011;
- 4.5.1.86. Undated and unsigned schedule of payment to Royal Security;
- 4.5.1.87. A termination letter dated 01 September 2009 from Mr Sello Motaung Supply Chain Manager addressed to Sidas Security Guards;

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- 4.5.1.88. Tender Advice dated 15 December 2010 from CTPC Secretariat to Mr Kabelo Mantsane;
- 4.5.1.89. Notice to proceed dated 03 March 2010;
- 4.5.1.90. An undated notice to Tenderers, with a tender number 525/2010/GAU/PS;
- 4.5.1.91. An addendum document dated 24 February 2010, for tender number 525/2010/GAU/PS;
- 4.5.1.92. An appointment letter dated 03 March 2010 for Royal Security signed by Mr Joe Buthelezi on 11 March 2010 and on 12 March 2010 by a representative of Royal Security;
- 4.5.1.93. A contract for project number 525/2010/GAU/PS which was signed by the representative of Royal Security on 22 February 2010.

**Documents relating to the advance a payment to Enlightened Security**

- 4.5.1.94. A copy of a quotation from Enlightened Security dated 09 September 2008;
- 4.5.1.95. A notice to proceed letter dated 17 October 2008 from Mr Joe Buthelezi to addressed to Enlightened security;
- 4.5.1.96. Unsigned letter dated 17 December 2008 from SJ Ngcobo Acting Regional Chief to Mr Sisa Mtwla Regional;
- 4.5.1.97. An unsigned copy of minutes of the meeting held on 31 August 2009 at 10:30;

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- 4.5.1.98. Tax invoice dated 01 September 2009 from Enlightened Security;
- 4.5.1.99. A copy of a memorandum dated 04 September 2009 from Mr Stephen Nkhuna to Mr Sisa Mtwla regarding application for the extensions of the suspension;
- 4.5.1.100. Letter dated 14 October 2008 from Mr Amen Dlamini to Mr Joe Ngcobo;
- 4.5.1.101. Undated copy of a document entitled "notice of the pending disciplinary hearing" reflecting author as Mr H Cohen signed on 07 January 2010 by an unspecified person;
- 4.5.1.102. A copy of tax invoice from Enlightened Security dated 01 November 2008;
- 4.5.1.103. A credit note a statement dated 05 May 2009 from Enlightened Security;
- 4.5.1.104. An untitled and unsigned schedule of payments relating to Enlightened Security;
- 4.5.1.105. A signed copy of the statement of oath dated 09 September 2009 from Mr Frans Makgaba;
- 4.5.1.106. A letter dated 10 September 2009 from Enlightened Security with REF "response to enquiry";
- 4.5.1.107. A letter dated 19 January 2010 addressed to Mr Joe Ngcobo from Mr Stephen Nkhuna;

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**Documents relating to the appointment of a media company to produce  
*Hambanathi***

4.5.1.108.A partnership agreement entered into between PRASA and KG Media Investment on 22 May 2012;

4.5.1.109.A notice to proceed from PRASA dated 20 May 2015 to KG Media regarding renewal of the media partnership commuter publication contract.

**Documents relating to the appointment of Mr Ezra Ndwandwe**

4.5.1.110.A motivation document indicating motivation for confinement for Ndwandwe Consultancy dated 25 June 2008;

4.5.1.111.An undated recommendation report for tender HO/HR/05/200/PR2248 addressed to the Chief Executive Officer from Chief Procurement Officer;

4.5.1.112.An unsigned and undated contract entered into between PRASA and Ndwandwe Consultancy for an amount of R7 091 712.00 (Vat Inclusive);

4.5.1.113.A memorandum entitled Group Procurement & Tender Administration dated 16 July 2008;

4.5.1.114.Eight(8) copies of Tax Invoice received from Ndwandwe Consultant to PRASA for the services rendered;

4.5.1.115.A resolution minute document entitled CTPC for project HO/HR/05/200/PR2248 stamped dated 08 June 2009;

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4.5.1.116. An undated submission of extension for project number HO/HR/05/200/PR2248;

4.5.1.117. A copy of a purchase order dated 10 June 2008;

4.5.1.118. A copy of a purchase order dated 05 June 2009;

4.5.1.119. Undated and unsigned recommendation from Chief Procurement Officer to Group Chief Executive Officer;

4.5.1.120. An e-mail correspondence from Miss Zoliswa Mbuli-Copiso to Mr Paul M Zikhali and Miss Matshidiso Mosholi;

4.5.1.121. An undated recommendation report from Chief Procurement Officer to Chief Executive Officer for tender number HO/HR/05/200/PR2248;

**Documents relating to the increase of scope and value for marketing and communications tender to Brand Leadership.**

4.5.1.122. Recommendation report on Re-branding from SARCC to PRASA to appoint Brand Leadership at the cost of R2 899 900.00 exclusive VAT signed and approved by Chief Procurement Officer and the GCEO on 11 December 2008;

4.5.1.123. Recommendation report on Marketing and Communication Services for PRASA group to appoint brand Leadership at the cost of R9 528 000.00 and R20 000 000.00 approved Chief Procurement Officer and the GCEO on 19 October 2008 (HO/M&C/305/07/2009);

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- 4.5.1.124. Agreement for provision of Marketing & Communication Services between Brand Leadership and PRASA;
- 4.5.1.125. Memorandum dated 16 July 2009 from Mr Tiro Holele to GCEO;
- 4.5.1.126. Undated document signed by Mr Tiro Holele;
- 4.5.1.127. Undated Notice to tenderers;
- 4.5.1.128. Copy of newspaper advertisement;
- 4.5.1.129. Document entitled "list of quotation/tender received" addressed to Mr Tiro Holele from CFSC/TPC Secretary;
- 4.5.1.130. Standard contract in tender documents;
- 4.5.1.131. Adjudication report dated 22 October 2010
- 4.5.1.132. Letter of acceptance from Brand Leadership to PRASA dated 21 October 2009;
- 4.5.1.133. Letters to service providers informing them that they have not been successful on the Marketing and Communication Services for PRASA;
- 4.5.1.134. Notice to Proceed from PRASA to Brand Leadership dated the 20 October 2009;
- 4.5.1.135. Rebranding tender dated 11 December 2008 Transaction value R3 305 886;

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- 4.5.1.136. Marketing & Communication tender dated 19 October 2009 at value of R29 528 000.00;
- 4.5.1.137. Confinement and update of Executive Lounge at value of R448 135.00.
- 4.5.1.138. Condonation from R30 million to R36.8 million;
- 4.5.1.139. Submission to condone increase of amount for Brand Leadership dated 26 May 2011;
- 4.5.1.140. Correspondence from Brand Leadership to PRASA regarding overdue account;
- 4.5.1.141. Submission for Adjudication for rebranding tender;
- 4.5.1.142. Submission for Adjudication for Marketing & Communication tender;
- 4.5.1.143. Adjudication Report for increase in contract value of the Marketing and Communication tender;
- 4.5.1.144. List of Quotations;
- 4.5.1.145. Briefing Session;
- 4.5.1.146. Payment schedule for Brand Leadership;
- 4.5.1.147. A memorandum dated 8 July 2010 requesting approval for a confinement approach on procurement of furniture branding of the executive lounge and upgrade of the 11th floor PRASA Boardroom;

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**Documents relating to the appointment of Mr Edwin Lekota on a tender for the development of a Contingency Emergency Preparedness Programme.**

4.5.1.148. Engagement letter between Lekga investments and PRASA dated 1 March 2008;

4.5.1.149. The unsigned minutes of the CFSC dated 25 August 2010;

4.5.1.150. A memo from Chief Procurement Officer Mr Chris Mbatha sent to GCEO, Mr Tshepo Lucky Montana;

4.5.1.151. A memorandum entitled tender advice dated 27 September 2010 prepared by the Company secretariat addressed to Mr Enos Ngutshane;

4.5.1.152. Publication in the PMG website dated 23 October 2009;

**Documents relating to award of a tender to Umjanji Consortium**

4.5.1.153. Briefing session attendance register dated 22 February 2011 in respect of tender HO/CA/739/02/2010;

4.5.1.154. The recommendation report for tender HO/CA/739/02/2010 in respect of the successful service provider;

4.5.1.155. A letter to proceed dated 31 January 2011 addressed to Umjanji Consortium;

4.5.1.156. Letters of regret dated 25 February 2011 addressed to other bidders;

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4.5.1.157. Media advertising and broadcasting concession agreement between PRASA and Umjanji Consortium;

4.5.1.158. The company registration certificate for Umjanji Media Consortium;

4.5.1.159. Letters from Primedia;

4.5.1.160. National Council of Provinces written reply from Minister of Transport dated 9 March 2012

**Documents relating to the award of a contract to Siyaya DB.**

4.5.1.161. An undated copy of the submission for adjudication in respect of the tender HO/INF(s)/203/06/2010: Signal and Telecommunications;

4.5.1.162. Unsigned copy of minutes of the CTPC dated 14 October 2010;

4.5.1.163. Memorandum dated 16 November 2010 from Mr Chris Mbatha addressed to Mr Tshepo Lucky Montana;

4.5.1.164. A memo entitled tender advice dated 26 November 2010 issued by Ms Matshidiso Mosholi to Ms Sorin Baltac;

4.5.1.165. A notice to proceed issued to Siyaya DB Engineers on 7 December 2010;

4.5.1.166. A contract between Siyaya DB and PRASA;

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**Document relating to the award of a tender for Park Station Development Framework to ARUP**

- 4.5.1.167. Preliminary report on bus theft dated 10 June 2011 addressed to the GCEO of PRASA from Mr Kabelo Mantsane;
- 4.5.1.168. Various Labour Court documents in respect of case between PRASA and Cromet Molepo;
- 4.5.1.169. CCMA award letter dated 14 August 2012 signed off by Mr Timothy Boyce, CCMA Senior Commissioner;
- 4.5.1.170. Tender recommendation for approval document from Supply Chain Management in respect of ARUP;
- 4.5.1.171. A letter of appointment for ARUP dated 20 December 2010 in respect of sub-precinct development framework was provided by PRASA;

**Documents relating to the theft of the buses at Autopax**

- 4.5.1.172. Ms Sindi Mabaso-Koyana affidavit dated 24 October 2013;
- 4.5.1.173. A report dated 26 January 2010 was addressed to the GCEO, from Mr Kabelo Mantsane;
- 4.5.1.174. A suspension letter dated 13 July 2010 addressed to Mr Frans Makgaba from Mr Saki Zamxaka;

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- 4.5.1.175. A disciplinary hearing notice dated 01 November 2010 issued to Mr Frans Makgaba;
- 4.5.1.176. Suspension letter dated 13 July 2010 addressed to Mr Chris Brand to Mr Saki Zamxaka;
- 4.5.1.177. Document entitled "annexure F" dated 25 January 2010 from Mr Kabelo Mantsane to Mr Saki Zamxaka;
- 4.5.1.178. Investigation report dated 09 July 2010
- 4.5.1.179. A memorandum dated 11 October 2010 from Mr Enos Ngutshane, Presiding officer addressed to Mr Chris Brand;
- 4.5.1.180. An undated referral to the CCMA document in respect of Mr Chris Brand;
- 4.5.1.181. A letter dated 20 July 2010 entitled stolen buses addressed to Mr Tokollo Mahlake from Ms Tilly Nkosi;
- 4.5.1.182. Investigation report dated 26 October 2010 prepared by Mr Daniel Momberg addressed to Ms Tiesie Lange;
- 4.5.1.183. A status report dated 24 February 2011 from Mr Francois van Eden, Senior Manager Security addressed the CEO of Autopax Mr Saki Zamxaka;
- 4.5.1.184. Insurance policy between Paladin and Autopax;
- 4.5.1.185. Claim form dated 17 November 2011;

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4.5.1.186. Email correspondence dated 23 February 2012 from Mr Gary Mabunda, Group Manager, Insurance and Risk to Mr Francois Van Eeden;

4.5.1.187. Email dated 23 February 2012 from Mr Saki Zamxaka addressed to Mr Gary Mabunda and Mr Francois Van Eeden;

4.5.1.188. An agreement between Autopax and Daimler Fleet Management South Africa;

**Documents relating to the award of a security services contract to Futuris Guarding**

4.5.1.189. A quotation dated 20 May 2010 from Mr Andre Van Tonder of Futuris Guarding addressed to Mr Frans Makgaba;

4.5.1.190. An acceptance of quotation document signed by Mr Frans Makgaba on 16 April 2010;

4.5.1.191. Memorandum of agreement between Autopax and Futuris Guarding, signed on 30 April 2010 by Mr Frans Makgaba;

4.5.1.192. A memorandum of agreement entered into between Autopax and Futuris Guarding on 20 July 2010;

4.5.1.193. Futuris Guarding invoices totalling R231 206.15 (Inclusive of VAT);

4.5.1.194. A suspension letter dated 13 July 2010 from Mr Saki Zamxaka addressed to Mr Frans Makgaba;

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4.5.1.195. The notification for hearing letter dated 02 November 2010 addressed to Mr Frans Makgaba from Mr Saki Zamxaka;

4.5.1.196. A memorandum entitled submission for the replacement of National Force Security in the Gauteng South Region dated 15 April 2009;

4.5.1.197. A memorandum entitled "termination of Security Contracts" dated 09 February 2010 prepared by Mr Steven Nkhuna;

**Documents relating to the termination of Rasakanya Builders contract**

4.5.1.198. Motivation for the month to month extension of Rasakanya Builders contract dated 09 March 2009;

4.5.1.199. Motivation for the month to month extension of Rasakanya Builders contract dated 27 March 2009;

4.5.1.200. Contract termination letter for Rasakanya Builders contract dated 28 September 2012;

**Documents relating to implementation of an upfront payment to FIFA World Cup**

4.5.1.201. An undated Memorandum of Understanding (MOU) between FIFA, MATCH, South African Government and PRASA;

4.5.1.202. A copy of an agreement entered into between FIFA and PRASA on 11 June 2009;

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4.5.1.203. A lease agreement entered into between PRASA, Autopax and MATCH in June 2010;

4.5.1.204. Annexure F of the agreement between PRASA and MATCH and FIFA;

4.5.1.205. Settlement agreement between PRASA and MATCH dated 12 April 2011;

4.5.1.206. PRASA's Annual report for the year ended 31 March 2011;

**Documents relating to incurring of an over expenditure**

4.5.1.207. A letter dated 22 January 2010 requesting urgent intervention into finance functions of PRASA from GCFO to GCEO;

4.5.1.208. A letter from Mr Nozipho Sangweni; Gauteng Regional Manager dated 21 January 2010 addressed to Mr Jason Mlaudzi;

4.5.1.209. A letter dated 20 May 2011 from Mr Todd, Credit Manager Metro file addressed to Mr Mansingh, Intersite Property Management;

4.5.1.210. A memo dated 16 January 2012 in respect of changes in management and controls signed off by Mr Kameshni Naidoo;

4.5.1.211. A copy of the provisional allocations to PRASA-2010 MTEF schedule reflecting the audited allocations;

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4.5.1.212. PRASA income statement budget including Shosholoza Meyl and Autopax for year 2009/10;

4.5.1.213. A consolidated statement of comprehensive income for the year ended March 2010;

4.5.1.214. A total of seven (7) letters dated 19 March 2009 from Mr David Kekana, CFO addressed to divisions of PRASA;

4.5.1.215. Statement of a former Senior Manager at PRASA dated 23 October 2013;

**Documents relating to a subsidy of R500 million received for Shosholoza Meyl**

4.5.1.216. PRASA, Annual Financial Statements for the period from 2008/9 to 2010/11;

4.5.1.217. Copies of the budgets for the years ending 2008/9 and 2009/10;

4.5.1.218. An undated letter received from the National Treasury entitled MTEF allocations 2008/9 to 2010/11;

4.5.1.219. Additional funding request document received from National Treasury;

**Documents relating to the incurring rental expenditure for Jorissen Building**

4.5.1.220. Lease agreements entered into between PRASA and Liberty Life on 14 December 2006;

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4.5.1.221. An agreement between PRASA and Transnet in respect of sale of Umjantshi building dated 28 September 2009;

4.5.1.222. Sale agreement between PRASA and Transnet dated 28 September 2009;

**Documents relating to the termination of contracts of Executives**

4.5.1.223. A settlement letter from Mr Montana addressed to Mr Salani Sithole dated 08 October 2008;

4.5.1.224. Settlement agreement for Mr Salani Sithole dated 7 October 2009 signed off by Mr Lindikhaya Zide;

4.5.1.225. Account payment schedule reflecting payment made to Mr Salani Sithole on 21 October 2009;

4.5.1.226. Settlement Agreement between PRASA and Mr Viwe Mlenzana, Case number J1687/11 dated 08 November 2011;

4.5.1.227. Settlement Agreement between PRASA and Ms Sindi Mabaso-Koyana, dated 30 April 2013;

4.5.1.228. The arbitration award letter dated 14 August 2012 in the case between Mr Cromet Molepo and PRASA;

4.5.1.229. PRASA application for leave to appeal dated 25 July 2013 in respect of a case between Mr Cromet Molepo and PRASA;

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4.5.1.230. Financial Statements for the years ending 2009/10, 2010/11 and 2011/12;

**Documents relating to the suspension of employees**

4.5.1.231. A memorandum dated 30 December 2012 prepared by Mr Silence Vilane, SATAWU Provincial Rail Secretary addressed to POBC, NOBC, Rail coordinators and PRASA Management.

4.5.1.232. A letter of suspension of Mr Craig Nte dated 12 February 2010.

4.5.1.233. A letter of termination of employment contract of Mr Craig Nte dated 17 January 2012.

**Documents relating to Dr Bridgette Gasa, a PRASA Board failure to disclose and manage a conflict of interest arising from her interest**

4.5.1.234. Letter dated 08 May 2011 to Dr Bridgette Gasa from the Minister of Transport;

4.5.1.235. Undated Directors disclosure of interest.

**Documents relating to the appointment of Mr Joel Chimanda**

4.5.1.236. Professional Services Contract dated 26 February 2009.

**Documents relating to the replacement of the Group Executive HR Mr Mphefo Ramutloa**

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- 4.5.1.237. A copy for the request to advertise the position of Group Executive, HCM with reference GEHCM/R&S/11/11/10 with closing date of 22 November 2010.
- 4.5.1.238. Copy of Mr Ramutloa's CV.
- 4.5.1.239. A copy of the internal Application Form.
- 4.5.1.240. Declaration of interest by Mr Montana dated 25 November 2010.
- 4.5.1.241. Declaration of interest by Mr Pule Moilola dated 25 November 2010.
- 4.5.1.242. Declaration of interest by Mr LB Boshielo dated 25 November 2010.
- 4.5.1.243. A copy of the interview questionnaire and score sheets.
- 4.5.1.244. A copy of the appointment letter dated 06 December 2011.
- 4.5.1.245. An undated copy of the regret letter to Mr Mondi Monde.

**Documents relating to failure to take disciplinary action against staff members involved in fraudulent Electronic Funds Transfers**

- 4.5.1.246. Fraudulent Electronic Funds Transfers;
- 4.5.1.247. Deloitte Report dated 26 February 2010;
- 4.5.1.248. Directors report 2008/09 PRASA Annual Report;

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4.5.1.249. Warning letter to Ms Kumara Pallaiyiah dated 09 June 2010;

4.5.1.250. Grievance document from Ms Kumarie Pallaiyiah.

**Evidence in respect of deferred issues to be dealt with in volume 2 of this report:**

4.5.1.251. Memorandum of Understanding between SARCC, Crowie, Intersite Management Services Ltd, eThekweni Municipality, KwaZulu Natal Department of Transport, Community Safety and Liaison dated 06 July 2007.

4.5.1.252. Approved Memo dated 20 September 2011 Group Executive Manager to Chief Procurement Officer regarding approval required on increased contract value to Crowie (Crowie projects (Pty) Ltd) Projects on the Bridge City Station Development Project;

4.5.1.253. Development Agreement between Crowie and SARCC dated 12 December 2007;

4.5.1.254. Development Agreement between Crowie Projects and PRASA dated 22 February 2010;

4.5.1.255. Project Implementation Agreement between PRASA and Crowie Report;

4.5.1.256. Resolution passed at meeting of Directors of Crowie Project;

4.5.1.257. Email from Ms Luyanda Gantsho to Mr Sydney Khuzwayo and Mr Thabo Mashea dated 06 August 2010;

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- 4.5.1.258. Email from Kevin McGill to Mr Pettersen dated 20 July 2011; and
- 4.5.1.259. Email from Dries Van Der Walt to Kevin McGill dated 30 September 2011;
- 4.5.1.260. Tender Adjudication and Evaluation Report.
- 4.5.1.261. Undated copy of Manager's disclosure of interest, other directorship and interest in contracts questionnaire form by Mr Vusi Twala.
- 4.5.1.262. Copy of the minutes of the Board of Control dated 01 December 2008.
- 4.5.1.263. An account payment schedule stamped paid 23 February 2010 signed by Mr Montana on 10 February 2010 reflecting a payment of R61 560 000;
- 4.5.1.264. The payment history in respect of payment to Transnet stamp dated 23 February 2010;
- 4.5.1.265. A copy of the budget for 2008/9, 2009/10 and 2010/11;
- 4.5.1.266. Financial statements for PRASA for the year 2008/9, 2009/10 and 2010/11 indicating actual capital expenditure;
- 4.5.1.267. Letter of appointment from the Minister of Transport to Mr Boshielo dated 01 October 2006;
- 4.5.1.268. Application letter dated 30 November 2009;
- 4.5.1.269. Autopax employee personal particulars form dated 06 May 2010;

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4.5.1.270. Advertisement in Sunday Times dated 29 November 2009;

4.5.1.271. Email correspondence dated 30 November 2009 from Mrs Boshielo to recruitment@apv.co.za;

4.5.1.272. Letter of appointment dated 15 April 2010 to Mrs Boshielo.

4.5.1.273. Undated declaration of interest form from Mr Sfiso Buthelezi;

4.5.1.274. Letter from the Minister of Transport to Mr Sfiso Buthelezi dated 08 May 2011.

4.5.1.275. Affidavit from the South African Airways;

4.5.1.276. Photographs taken between 24 and 27 September 2009

#### **4.6. Meetings and Interviews conducted**

4.6.1. Meetings were held with Mr Lucky Makhubela of Makhubela Attorneys on 06 February 2013; 13 March 2013; and 21 and 22 May 2015;

4.6.2. A meeting was held with Mr Lindikhaya Zide, Company Secretary of PRASA on 06 February 2013 and 01 August 2013;

4.6.3. Meetings were held with Public Protector and Mr Lucky Montana; CGEO of PRASA on 01 August 2013 and 21 and 22 May 2015;

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- 4.6.4. A meeting was held with Public Protector and Mr Sfiso Buthelezi, then Chairperson of the PRASA Board on 01 August 2013;
  - 4.6.5. Meetings were held with former senior managers of PRASA (names withheld) during the period 2012 and 2014;
  - 4.6.6. Numerous meetings were held with the Complainant between 2012 and 2015 including on the following date: 10 May 2013; 14 May 2013; 12 July 2013; 02 August 2013; 23 August 2013; 28 January 2014 and 04 May 2015
  - 4.6.7. An interview was conducted with Ms Sindi Mabaso-Koyana on 24 October 2013;
  - 4.6.8. Interviews were held with Mr Cromet Molepo on 26 July 2013; 30 May 2014 and 25 July 2014;
  - 4.6.9. Meeting with officials of AGSA on 25 June 2015;
  - 4.6.10. Meeting with Public Protector and Chairperson of the PRASA Board on 30 June 2015;

#### **4.7. Correspondence sent and received**

- 4.7.1. Letter dated 06 July 2012 from the Public Protector to Mr Craig Nte confirming that a preliminary investigation will be conducted;
- 4.7.2. Letter dated 07 November 2012 from the Public Protector to Mr Lucky Montana regarding investigation on the numerous allegations;

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- 4.7.3. E-mail correspondence dated 09 November 2012 from the Public Protector to Mr Lucky Montana concerning allegations against PRASA;
  - 4.7.4. Letter correspondence dated 13 November 2012 from Mr Lucky Montana to the Public Protector, first response to the Public Protector: regarding investigation on the numerous allegations;
  - 4.7.5. E-mail correspondence between Mr Craig Nte and the Public Protector from 01 November 2012 to 07 December 2012 concerning PRASA investigation;
  - 4.7.6. Letter dated 04 December 2012 from Mr Lucky Montana to the Public Protector regarding investigation and extension;
  - 4.7.7. Letter dated 06 December 2012 from the Public Protector to Mr Lucky Montana concerning granting of extension;
  - 4.7.8. Letter dated 06 December 2012 from the Public Protector to Messrs Makhubela Attorneys; concerning granting of extension;
  - 4.7.9. E-mail correspondence dated 25 January 2013 from the Public Protector to Makhubela Attorneys concerning delays in responding to the Public Protector;
  - 4.7.10. E-mail correspondence dated 25 January 2013 from Makhubela Attorneys to the Public Protector acknowledging the delays;
  - 4.7.11. Letter dated 01 February 2013 from Reynaud Daniels to Mr Tshepo Lucky Montana concerning action for damages against Ephraim Mphahlele and SATAWU;

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- 4.7.12. Memorandum of demands response dated 07 February 2013 from National Transport Movement to Office of the Public Protector concerning dissatisfaction about delay of the PRASA investigation;
  - 4.7.13. Letter dated 12 February 2013 from Makhubela Attorneys to the Public Protector regarding Deloitte's report and legal proceedings against SATAWU and Mr Mphahlele;
  - 4.7.14. Letter dated 13 February 2013 Makhubela Attorneys to the Public Protector regarding SATAWU distancing itself from the allegations made by then President Mr Mphahlele;
  - 4.7.15. Letter dated 14 February 2013 from the Public Protector to Makhubela Attorneys regarding submission by PRASA;
  - 4.7.16. E-mail correspondence from 06 December 2012 to 05 February 2013 between Makhubela Attorney and the Public Protector concerning Investigation by the Public Prosecutor against PRASA;
  - 4.7.17. E-mail correspondence between the Public Protector and Makhubela Attorneys from 05 February 2013 to 11 February 2013 concerning investigation against PRASA;
  - 4.7.18. E-mail correspondence from 06 December 2012 to 25 January 2013 between Makhubela Attorney and the Public Protector concerning investigation against PRASA;

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- 4.7.19. E-mail correspondence dated 06 February 2013 from the Public Protector to Mr Craig Nte concerning PRASA investigation;
  - 4.7.20. Letter dated 18 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA and Mr T L Montana;
  - 4.7.21. E-mail correspondence dated 18 February 2013 and 19 February 2013 between Makhubela Attorney and the Public Protector concerning PRASA;
  - 4.7.22. Letter dated 18 February 2013 from Makhubela Attorneys to the Public Protector regarding PRASA;
  - 4.7.23. E-mail correspondence dated 19 February 2013 from Mr Mthethwa to the Public Protector regarding PRASA;
  - 4.7.24. Letter correspondence dated 20 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;
  - 4.7.25. E-mail correspondence dated 20 February 2013 and 21 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;
  - 4.7.26. E-mail correspondence dated 21 February 2013 from the Public Protector to Mr Craig Nte and copied to Mr Ephraim Mphahlele concerning response to NTM memorandum of demands;
  - 4.7.27. Letter correspondence dated 21 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;

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- 4.7.28. Letter dated 21 February 2013 from the Public Protector to Mr Gasant regarding Authorisation to serve a subpoena by delivery;
  - 4.7.29. Subpoena correspondence dated 26 February 2013 to Mr Lucky Montana from the Public Protector;
  - 4.7.30. Subpoena dated 26 February 2013 to Mr Sfiso Buthelezi from the Public Protector;
  - 4.7.31. Letter dated 26 February 2013 from the Public Protector to Mr Gasant concerning authorisation to serve subpoena by delivery;
  - 4.7.32. E-mail correspondence dated 28 February 2013 from the Public Protector to Mr Craig Nte and copied to Mr Ephraim Mphahlele regarding the delays by PRASA;
  - 4.7.33. Return of service correspondence dated 01 March 2013 in the case between the Public Protector and Mr Sfiso Buthelezi;
  - 4.7.34. Letter correspondence dated 05 March 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;
  - 4.7.35. E-mail correspondence from 13 February 2013 to 06 March 2013 between Makhubela Attorneys and the Public Protector concerning PRASA;
  - 4.7.36. Letter dated 15 March 2013 from Mr Tshepo Lucky Montana to the Public Protector regarding responses to the numerous allegations against PRASA;
  - 4.7.37. Letter dated 15 March 2013 to the Public Protector from Makhubela Attorneys regarding the numerous allegations against PRASA;

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- 4.7.38. Letter dated 26 March 2013 from the Public Protector to Mr Sfiso Buthelezi concerning subpoena issued against him;
  - 4.7.39. Letter dated 26 March 2013 from the Public Protector to Mr Montana concerning subpoena issued against him;
  - 4.7.40. Letter dated 04 April 2013 from Mr Montana to the Public Protector concerning; subpoena issued on 26 February 2013;
  - 4.7.41. E-mail correspondence dated 07 April 2013 from Mr Boitumelo Kgosana/ PRASA to the Public Protector concerning subpoena issued on 26 February 2013;
  - 4.7.42. Letter correspondence dated 08 May 2013 from Mr Craig Nte to the Public Protector regarding intention to submit a memorandum of demand.
  - 4.7.43. Letter to the Chairman of the PRASA Board from the Public Protector on 26 June 2015;
  - 4.7.44. Letter to Mr Montana from the Public Protector dated 01 July 2015;
  - 4.7.45. Letter from the Chairman of the PRASA Board to the Public Protector dated 02 July 2015;
  - 4.7.46. Letter from Mr Montana to the Public Protector dated 13 July 2015.
  - 4.7.47. Minutes of the SARCC Audit and Risk Management Committee Meeting dated 19 November 2008;

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- 4.7.48. Minutes of the Meeting of the PRASA Board of Control of SARCC dated 01 December 2008;
  - 4.7.49. Minutes of the PRASA Board of Control SARCC Audit and Risk Management Committee Meeting dated 05 February 2009;
  - 4.7.50. Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 14 May 2009;
  - 4.7.51. Minutes of the Meeting of the PRASA Board of Control dated 21 May 2009;
  - 4.7.52. Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 23 July 2009;
  - 4.7.53. Minutes of the Meeting of the PRASA Board of Control dated 30 July 2009;
  - 4.7.54. Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 18 November 2009;
  - 4.7.55. Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 30 November 2009;
  - 4.7.56. Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 23 February 2010;
  - 4.7.57. Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 11 May 2010; and

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4.7.58. Minutes of the Meeting of the PRASA Board of Control dated 05 August 2010.

**Notices issued in terms of section 7(9) of the Public Protector Act, 1994, to:**

- 4.7.59. Mr Montana dated 06 February 2015;
- 4.7.60. Dr Bridgette Gasas dated 05 May 2015;
- 4.7.61. Mr Goodman Matampi dated 12 May 2015;
- 4.7.62. Ms Tara P Ngubane dated 12 May 2015;
- 4.7.63. Mr Chris Mbatha 12 May 2015;
- 4.7.64. Mr Tumisang R Kgaboesele dated 08 and 12 May 2015 respectively;
- 4.7.65. Mr D Xelelo dated 08 May 2015;
- 4.7.66. Mr Joe Buthelezi dated 08 May 2015;
- 4.7.67. Mr Steven Nkhuna dated 08 May 2015;
- 4.7.68. Ms Nozipho Sangweni dated 08 May 2015;
- 4.7.69. Ms Jackie Moshe 08 May 2015;
- 4.7.70. Mr Ronnie Khumalo dated 05 May 2015;
- 4.7.71. Mr Chris Moloji dated 05 May 2015;

**Responses received to notices issued in terms of section 7(9) of the Public Protector Act, 1994, from:**

- 4.7.72. The former GCEO of PRASA, Mr Montana dated 05 June 2015;
- 4.7.73. Response received from Mr Tara Ngubane dated 17 July 2015;
- 4.7.74. Responses received from Ms Nozipho Sangweni dated 24 July 2015 and 29 July 2015;
- 4.7.75. Response received from Mr Tumisang Kgaboesele dated 24 July 2015;
- 4.7.76. Response received from Mr Ronnie Khumalo dated 24 July 2015;

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- 4.7.77. Response received from Dr Bridgette Gasa dated 25 July 2015;
  - 4.7.78. Response received from Mr Chris Moloji dated 24 July 2015
  - 4.7.79. Response received from Mr Christopher Sangweni dated 29 July 2015;
  - 4.7.80. Response received from Mr Goodman Matambi dated 31 July 2015;
  - 4.7.81. Response received from Mr Kabelo Mantsane dated 11 August 2015;

#### **4.8. Websites consulted**

- 4.4.1.1 <http://www.whoswho.co.za> (April 2015);
- 4.4.1.2 <http://www.cipc.co.za> (May 2015);
- 4.4.1.3 <http://www.saflii.org.za> (15 July 2015);and
- 4.4.1.4 <http://www.treasury.gov.za> (April and May 2015)

#### **4.9. Legislation and other prescripts**

##### **Acts**

- 4.9.1. The Constitution of the Republic of South Africa, 1996;
- 4.9.2. The Public Protector Act, 1994;
- 4.9.3. The Labour Relations Act, 1995;
- 4.9.4. The Public Finance Management Act, 1999;
- 4.9.5. Promotion of Administrative Justice Act, 2000;
- 4.9.6. The Preferential Procurement Policy Framework Act, 2000;
- 4.9.7. National Railway Safety Regulator Act, 2002;and
- 4.9.8. Prevention and Combatting of Corrupt Activities Act, 2004.

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### **Regulations**

- 4.9.9. National Treasury Regulations issued in terms of PFMA, 2005.

### **Policies**

- 4.9.10. The Supply Chain Management Policy of PRASA, February 2009.

### **National Guidelines**

- 4.9.11. National Treasury SCM Guidelines dated February 2004.

### **Case law**

- 4.9.12. Allpay Consolidated Investment Holdings (PTY)Ltd v Chief Executive Officer of the South African Social Security Agency (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC);
- 4.9.13. Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49

### **Touch stones from previous Public Protector Reports**

- 4.9.14. "Against the Rules Too", Report No.33 of 2010/2011 (Volume 2)
- 4.9.15. "GNS", Report No. 20 of 2010/2011

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## 5. THE STANDARD THAT SHOULD HAVE BEEN COMPLIED WITH

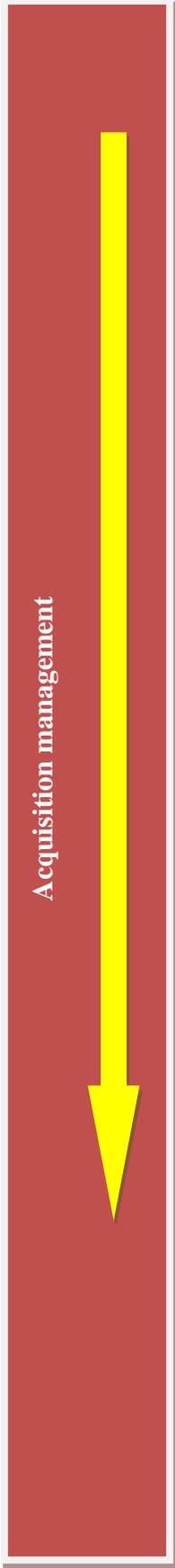
### Procurement irregularities

#### 5.1 General Principles

- 5.1.1 Conduct at PRASA relating to the procurement of goods and services is principally regulated by its own corporate SCM policy. The policy communicates upfront that it seeks to give effect to applicable constitutional, legal, government policy and National Treasury SCM Guidelines relating to authorised procurement of goods and services.
- 5.1.2 Key provisions regulating the impugned conduct of the GCEO and other PRASA functionaries as per the complaints cover the entire SCM cycle from Demand Management, Acquisition Management; Logistics Management; Disposal Management; Risk Management; up to Regular assessment of supply chain performance. Any procurement transaction executed according to the rules and accordingly qualifying not to be adjudicated as constituting maladministration or improper conduct, would have conformed to the following flow chart:

**Schematic: Procurement Steps and areas of responsibility in respect of acquiring goods and services, lease and accommodation**

PROCUREMENT STEPS		RESPONSIBLE DIVISION
Preparation & Demand Management	<b>PROCUREMENT STEPS</b>	<b>RESPONSIBLE DIVISION</b>
	<b>INCEPTION / NEEDS ANALYSIS</b>	<b>PRASA Supply Chain Management Unit (SCM)</b>
	1. Future need requirements;	
	2. Identification of critical delivery dates;	
	3. The frequency of need;	
	4. Budget availability;	
	5. Expenditure analysis (based on past expenditure);	
	6. Specifications;	
	7. Commodity analysis ( checking for alternatives)	
	8. Industry analysis;	
	9. Initiation and preparation requests for proposal/ tender/quote to and from potentials suppliers;	
	10. Implementations of preferential procurement.	
	<b>FINANCIAL PLANNING</b>	
	Recommendation of Financial plan	GCEO
Approval of Financial plan	BOC	
Recommendation of budget approval	GCEO	
Approval of budget	BOC	



**PROCUREMENT PROCESS**

- 1. Assess PRASA's need, including nature and extent of service required End user  
(divisions within PRASA)
- 2. Determine urgency and other relevant factors

**PROCUREMENT STRATEGY**

- 1. Acquisition management SCM
- 2. Obtaining quotations, inviting competitive Bids,  
Pre-qualification of bidders and two-stage bidding process.
- 3. Compiling bid documents and criteria, inviting,  
Evaluating and awarding bids.

**SUPPLY CONTRACT**

- 1. To negotiate, conclude, approving, entering into, amending terminating or  
Cancelling any operational agreement GCEO
- 2. Lease or rental agreement (excluding financial lease transaction) GCEO



**EVALUATION OF BIDS**

**1. Method**

- 1.1 Check compliance with bid documents Bid Evaluation Committee (BEC)
- 1.2 Disqualifications of non-compliant bids
- 1.3 Bid evaluation Cross Functional Sourcing Committee (CFSC) and BEC
- 1.4 Bid Adjudication CFSC

**2. Recommendation of bids**

- 2.1 Recommendation of request for confinement to the Corporate Tender Procurement Committee (CTPC) Divisional Tender and Procurement Committee (DTPC)
- 2.2 Recommendation of tenders to the CTPC as per Delegation of Authority DTPC
- 2.3 Recommendation of confinement to Regional Manager as per delegation Of Authority Regional Tender and Procurement Committee (RTPC)
- 2.4 Recommendation of requests for confinement to the DTPC as per Delegation of Authority RTPC
- 2.5 Recommendation of tenders to the Regional Manager RTPC
- 2.6 Review and recommendation of extension of contracts to the Regional Manager As per Delegation of Authority CTPC
- 2.7 Recommend withdrawal of bids after closing time, amendments and cancellation after awarding, transfer and cession of contracts CFSC
- 2.8 Recommendation for award of Strategic Partnership to BoC GCEO



**Award and contract management**

- 1. Tender approval
  - 1.1 Financial transaction above R100 million PRASA Board of Control (BOC)
  - 1.2 Financial transaction below R100 million GCEO
  - 1.3 Financial transaction below R50 million CE of subsidiaries
  - 1.4 Contractual periods limitations above five years GCEO
  - 1.5 Acquisition, use and disposal of immovable assets GCEO, CE and CPO
  - 1.6 Strategic Partnerships above R500 million BoC
  - 1.7 Capital Projects above R100 million BoC
  - 1.8 Capital Projects below R100 million GCEO
  - 1.9 Minor Capital Works R20 million and below CEO
  - 1.10 Minor Capital Works R5 million and below Procurement Manager of  
Division, Subsidiary and Head Office
  - 1.11 Operating tenders of R100 million and below GCEO
  - 1.12 Operating tender of R50 million and below CFO and CEO
  - 1.13 Operating tenders of R1 million and below Procurement Manager of  
Division, Subsidiary and Head Office
  - 1.14 Maintenance and material tenders of R20 million and below CEO and CFO
  - 1.15 Maintenance and material tenders of R10 million and below CPO
  - 1.16 Maintenance and material tenders of R1 million and below Procurement Manager  
of Division, Subsidiary and Head Office
  - 1.17 Strategy and office equipment of R5 million and below CPO
  - 1.18 Strategy and office equipment of R1 million and below Procurement Manager  
of Division, Subsidiary and Head Office
  - 1.19 Lease and rental of R100 million and below GCEO
  - 1.20 Lease and rental of R25 million and below CEO and CFO
  - 1.21 Lease and rental of R10 million and below CPO
  - 1.22 Lease and rental of R5 million and below Procurement Manager  
of Division, Subsidiary and Head Office

FINAL AWARD

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- 5.1.3 It is worth noting that the flow chart does not differ materially from the one presented in my report on "*Against the Rules*" (page 41).
- 5.1.4 I have considered it proper to also present a comprehensive overview of all the key constitutional provisions, laws, policies and related regulatory instruments that collectively shape the standard of compliance that the impugned PRASA transactions or decisions should have complied with to escape being classified as irregular thus constituting maladministration or improper conduct.
- 5.1.5 It must be understood upfront that for conduct to escape a finding of irregularity and ultimately, maladministration or improper conduct, the decision maker must have had authority to act, acted within the confines of that authority and followed the procedure prescribed by the authorising instrument should such procedure be prescribed. However, it must be equally noted, as clarified by the Constitutional Court in *Allpay Consolidated Investment Holdings (PTY) Ltd v Chief Executive Officer of the South African Social Security Agency* that deviation *per se* does not deserve an irregularity finding.
- 5.1.6 Where the authorising instrument permits deviation, a finding of irregularity can only be escaped only if the conduct in question complied with the permission to deviate and remained within the permissible boundaries. In other words deviation is permitted under specified conditions and becomes irregular if such specified conditions were not complied with. Conduct that does not comply with prescribed procedure or permissible deviation provisions, it may still escape irregularity if the deviation was not material and the impugned conduct was reasonable rational in the circumstances.

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## 5.2 The Constitution

5.2.1 The Constitution enjoins PRASA and all other organs of state to ensure that contracts for goods and services are entered into in accordance with a system that is **fair, equitable, transparent, competitive and cost effective**. Section 217 of the Constitution provides that:

*“(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.”.....*

*(2) Subsection ( 1 ) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for-*

*(a) categories of preference in the allocation of contracts; and*

*(b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination...”*

5.2.2 Section 33(1) of the Constitution provides that:

*“(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*

*(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*

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(3) *National legislation must be enacted to give effect to these rights and must-*

- (a) *provide for the review of administrative action by a court or, where appropriate,*
- (b) *impose a duty on the state to give effect to the rights in subsections (1) and (2);an independent and impartial tribunal; and*
- (c) *promote an efficient administration."*

5.2.3 When cancelling contracts with service providers, PRASA is required to follow a procedure that is fair, reasonable and also provide written reasons for such cancellation.

5.2.4 The provisions of section 33 of the Constitution also apply to labour administrative actions such as disciplinary action taken against employees.

5.2.5 **Allpay Consolidated Investment Holdings (PTY)Ltd v Chief Executive Officer of the South African Social Security Agency (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC)**

5.2.5.1 In his judgment on 29 November 2013 Justice Froneman held that:

*"It is because procurement so palpably implicates socio-economic rights that the public has an interest in it being conducted in a fair, equitable, transparent, competitive and cost-effective manner."*

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5.2.5.2 The Court further held that:

*"...deviations from fair process may themselves all too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence insistence on compliance with process formalities has a three-fold purpose: (a) it ensures fairness to participants in the bid process; (b) it enhances the likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influences."*

5.2.5.3 With regards to compliance with the regulatory framework in procurement, the court held that:

*"Compliance with the requirements for a valid tender process, issued in accordance with the constitutional and legislative procurement framework, is thus legally required. These requirements are not merely internal prescripts that SASSA may disregard at whim. To hold otherwise would undermine the demands of equal treatment, transparency and efficiency under the Constitution. Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms of procedural fairness. That does not mean that administrators may never depart from the system put into place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair."*

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5.2.5.4 In resorting to procurement under emergency/ urgency provisions state organs cannot rely on lack of planning or self-created urgency to justify deviation from the mandatory competitive and transparent bidding processes.

### **5.3 Applicable Legislation**

#### **5.3.1 Overview**

5.3.1.1 Building on section 217 of the Constitution, national legislation seeks to provide public functionaries, principally accounting officers and authorities, with guidance regarding the key elements of a procurement system that is fair, equitable, transparent, competitive and cost effective. Practical measures need to be implemented to ensure that procurement in their organs of state is undertaken in accordance with such a system.

5.3.1.2 The legislative framework, which includes the Preferential Procurement Policy Framework Act 5 of 2000, Broad Based Black Economic Empowerment Act 53 of 2003, the Public Finance Management Act 1 of 1999 and Treasury Regulations, also incorporates elements of financial management, more specifically relating to avoiding financial mismanagement in the procurement of goods and services.

5.3.1.3 The legislative framework basically unpacks the constitutional principles such as fairness, equity, transparency and competitiveness while outlining processes to be followed for a proper procurement process

5.3.1.4 It is worth noting that the six phased Supply Chain Management cycle, incorporating Demand Management, Acquisition Management; Logistics Management; Disposal Management; Risk Management; and Regular Assessment

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of Supply Chain Performance, that is captured in the PRASA SCM Policy comes from paragraph 16A3.2 of Treasury Regulation which seeks to provide an integrated framework that seeks to simplify compliance with the legal framework for public functionary involved in the procurement of goods and services. It is my considered view that compliance with the PRASA's policy barring the threshold for the procurement of goods without a tender, automatic compliance with the constitutional and legal policy framework. In the same token, a violation of the PRASA SCM Policy translates into contravention of the national legal framework on procurement.

#### 5.4 **Preferential Procurement Policy Framework Act (PPPFA), Act 5 of 2000 (PPPFA)**

5.4.1 The PPPFA, the key legislation, directly giving effect to section 217 of the Constitution principally provides guidance on striking a balance between the weighting of the functionality of goods and services providers, incorporating pricing and ability to deliver, and considerations of equitable access to state contracts for historically disadvantaged business owners or suppliers.

5.4.2 The PPPFA provides the framework for implementation of preferential procurement policy. Section (2) states that:

*“(1) An organ of state must determine its preferential procurement policy and implement it within the following framework:*

*(a) A preference point system must be followed;*

*(b) (i) for contracts with a Rand value above a prescribed amount a maximum of 10 points may be allocated for specific goals as*

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*contemplated in paragraph (d) provided that the lowest acceptable tender scores 90 points for price;*

*(ii) for contracts with a Rand value equal to or below a prescribed amount a maximum of 20 points may be allocated for specific goals as contemplated in paragraph (d) provided that the lowest acceptable tender scores 80 points for price;*

*(c) any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula;*

*(d) the specific goals may include:*

*(i) contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability;*

*(ii) implementing the programmes of the Reconstruction and Development Programme as published in Government Gazette No. 16085 dated 23 November 1994;*

*(e) any specific goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender;*

*(f) (f) the contract must be awarded to the tenderer who scores the highest points unless objective criteria in addition to those*

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*contemplated in paragraphs (d) and (e) justify the award to another tenderer; and*

*(g) (g) any contract awarded on account of false information furnished by the tenderer in order to secure preference in terms of this Act, may be cancelled at the sole discretion of the organ of state without prejudice to any other remedies the organ of state may have.*

*(2) Any goals contemplated in subsection (1) (e) must be measurable, quantifiable and monitored for compliance."*

5.4.3 The PPPFA is essentially given life through the Broad Based Black Economic Empowerment Act 53 of 2003 and National Treasury SCM Guidelines.

## 5.5 **Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEEA)**

5.5.1 The BBBEEA, essentially seeks to redress the legacy of exclusion of black people (as defined in the Act and further defined in the BEE codes) in the South African economy before the advent of democracy (Before April 27 1994), by imposing preferential for business composition and other equity considerations.

5.5.2 Key provisions of the BBBEEA that PRASA the impugned PRASA procurement activities had to comply with include the requirement of a balance between equity and cost effectiveness. The BBBEEA is principally implemented through Codes of good practice that provide more elaborate guidelines on appropriate weights to be accorded to enterprise functionality and its BEE profile using points to be allocated during the bid adjudicating and evaluation processes Treasury Regulations

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integrate the provisions of the BEE Codes with financial management prescripts arising from the Public Finance Management Act (PFMA)

## 5.6 Public Finance Management Act (PFMA), 1 of 1999

5.6.1 Although essentially setting standards for financial management, including financial controls, the PFMA’s provisions have enormous compliance implications for and, to some extent; spill over to the regulation of aspects of state procurement. Key provisions in this regard are principally those relating to fiscal discipline or prudence and the duties imposed on accounting officers and authorities.

5.6.2 It is the PFMA read with Treasury Regulations and guidelines issued under it that bring everything regarding the responsibilities that the PRASA Board and GCEO were required to comply with to escape a finding of maladministration or improper conduct owing to tender and related financial irregularities as alleged in the complaints investigated. Worth noting is that while the GCEO of PRASA is not statutorily the accounting officer as the Board is the accounting authority, through delegations, he has become the accounting officer.

5.6.3 The preamble of the PFMA announce that it seeks:

*“To regulate financial management in the national government and provincial governments; to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively; to provide for the responsibilities of persons entrusted with financial management in those governments; and to provide for matters connected therewith.”*

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5.6.4 The PFMA imposes certain basic responsibilities on Accounting officers regarding financial and procurement management. Relevant to the questions that had to be answered in regard to the impugned conduct of the GCEO and other functionaries are principally regulated by section 38 which provides, among others, that:

*"The accounting officer for a department, **trading entity** or constitutional institution—*

- (a) must ensure that that department, trading entity or constitutional institution has and maintains:*
  - (i) **effective, efficient and transparent systems of financial and risk management and internal control;***
  - (ii) ...*
  - (iii) **an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;***
  - (iv) a system for properly evaluating all major capital projects prior to a final decision on the project;*
- (b) is responsible for the effective, efficient, economical and transparent use of the resources of the department, trading entity or constitutional institution;*
- (c) must take effective and appropriate steps to:*
  - (i) collect all money due to the department, trading entity or constitutional institution;*
  - (ii) **prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and***
  - (iii) manage available working capital efficiently and economically;*
- (d) is responsible for the management, including the safe-guarding and the maintenance of the assets, and for the management of the liabilities, of the department, trading entity or constitutional institution;*
- (e) ...*

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- (f) **must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period;**
  - (g) **on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing,** particulars of the expenditure to the **relevant treasury** and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender PRASA Board;
  - (h) **must take effective and appropriate disciplinary steps** against any official in the service of the department, trading entity or constitutional institution who:
    - (i) *contravenes or fails to comply with a provision of this Act;*
    - (ii) *commits an act which undermines the financial management and internal control system of the department, trading entity or constitutional institution; or*
    - (iii) makes or permits an unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure”**

5.6.4.1 Section 1 of the PFMA provides for definitions.

*“Fruitless and wasteful expenditure- means expenditure which was made in vain and would have been avoided had reasonable care been exercised;” and*

*“Irregular expenditure- means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation”.*

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- 5.6.4.2 Section 51(b)(ii) of the PFMA further provides that an accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.
- 5.6.4.3 The same as the PRASA SCM policy, the PFMA, together with the National Treasury Regulations and guidelines, impose a responsibility for demand management, which includes requirement that proper planning be in place when setting out a budget and as a consequence, needs are prioritized and budgeted for. The ideal scenario is a need should be identified, analyzed, and included in the strategic planning and therefore budgeted for.
- 5.6.4.4 With regard to budgeting, paragraph 52 of the PFMA, directs PRASA to do the following:

*“Annual budget and corporate plan for schedule 2 public entities and government business enterprises- The accounting authority for a public entity listed in schedule 2 or a government business entity listed in schedule 3 must submit to the accounting officer for a department designated by the executive authority responsible for that Public entity or government business enterprise, and to the relevant treasury at least 1 month or another period agreed by National Treasury before start of the financial year*

- (a) A projection of revenue, expenditure and borrowings for the financial year in the prescribed format; and*
- (b) A corporate plan in the prescribed format covering the affairs of the public entity or business enterprise for the following three financial years, and if it has subsidiaries, also the affairs of the subsidiaries.”*

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## 5.7 Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PCCA Act)

### 5.7.1 Section 12 of the PCCA Act provides that:

- “(1) Any person who, directly or indirectly-*
- (a) Accepts or agrees or offers to accept any gratification from any person whether for the benefit of himself or herself or for the benefit of that other person or of another person; or*
  - (b) Gives or agrees or offers to give to any person any gratification whether for the benefit of that other person or for the benefit of another person*
    - (i) In order to improperly influence in any way-*
      - (aa) The promotion, execution or procurement of any contract with a public body, private organisation, corporate body or any other organisation or institution; or*
      - (bb) The fixing of the price, consideration or other moneys stipulated or otherwise provided for in any such contract; or*
    - (ii) as a reward for acting as contemplated in paragraph (a) is guilty of an offence.”*

## 5.8 National Treasury Regulations

5.8.1 Treasury regulations, as indicated earlier, integrate all of the constitutional and legislative requirements for procurement and financial management and set out clear guidelines to facilitate legal compliance. It is these regulations that provide the six phased supply chain management system mentioned earlier and reproduced in the SCM Policy.

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5.8.2 Key compliance requirements relevant to the conduct questioned in the PRASA complaints arise from National Treasury Regulations 2005 issued in terms of the PFMA Act of 1999.

5.8.3 Paragraph 16A3.2 of the National Treasury Regulations of March 2005 states that:

*"A supply chain management system...must-*

- a) be fair, equitable, transparent, competitive and cost effective;*
- b) Be consistent with the Preferential Procurement Policy Framework Act, 2000;*
- c) Be consistent with the Broad Based Black Economic Empowerment Act, 2003;*  
*and*
- d) Provide for at least the following:-*
  - i. Demand management;*
  - ii. Acquisition management;*
  - iii. Logistics management;*
  - iv. Disposal management;*
  - v. Risk management; and*
  - vi. Regular assessment of supply chain performance."*

5.8.4 Paragraph 16A6.1 of the National Treasury Regulations of March 2005 states that:

*"Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury"*

5.8.5 Paragraph 16A6.3 of the National Treasury Regulations of March 2005 states that:

*"The accounting officer or accounting authority must ensure that-*

- a) Bid documentation and the general conditions of a contract are in accordance with-*

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- i. *The instructions of National Treasury; or*
  - ii. *...*
  - b) *...*
  - c) *Bids are advertised in at least the Government Tender Bulletin for a minimum period of 21 days before closure, except in urgent cases when bids may be advertised for such shorter period as the accounting officer or accounting authority may determine..."*

5.8.6 Paragraph 16A6.4 of the National Treasury Regulations of March 2005 state that:

*"If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required good or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."*

5.8.7 According to paragraph 15.10.1.1 of the National Treasury Regulation of March 2005, the accounting officer is responsible for establishing systems, procedures, processes and training and awareness programmes to ensure efficient and effective banking and cash management.

5.8.8 Paragraph 15.10.1.2 (c) of the National Treasury Regulations of March 2005 provides that for purposes of the regulation, cash management includes avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier.

5.8.9 Paragraph 33.1.1 of the National Treasury Regulations of March 2005 provides that if an employee is alleged to have committed financial misconduct, the accounting authority of the public entity must ensure that an investigation is conducted into the

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matter and if confirmed, must ensure that a disciplinary hearing is held in accordance with the relevant prescripts.

5.8.10 Paragraph 33.1.2 of the National Treasury Regulations of March 2005 provides that the accounting authority must ensure that the investigation is instituted within 30 days from the date of discovery of the alleged financial misconduct.

5.8.11 Paragraph 33.1.3 of the National Treasury Regulations of March 2005 provides that if an accounting authority or any of its members is alleged to have committed financial misconduct, the relevant executive authority must initiate an investigation into the matter and if the allegations are confirmed, must ensure that appropriate disciplinary proceedings are initiated immediately.

### **Budget**

5.8.12 Paragraph 5.1 of the National Treasury Regulations of March 2005 makes it mandatory for the Accounting Officer of an institution to prepare a strategic plan for the forthcoming Medium Term Expenditure Framework (MTEF) cycle.

5.8.13 Paragraph 5.2.2 of the National Treasury Regulations of March 2005 requires that the strategic plan include the following:

*"5.2.2 The strategic plan must –*

- (a) Cover a period of three years and be consistent with the institution's published medium term expenditure estimates;*

- 
- (b) *Include specific Constitutional and other legislative, functional and policy mandates that indicate the output deliverables for which the institution is responsible;*
  - (c) *include policy developments and legislative changes that influence programme spending plans over the three-year period;*
  - (d) *include the measurable objectives, expected outcomes, programme outputs, indicators (measures) and targets of the institution's programmes;*
  - (e) *include details of proposed acquisitions of fixed or movable capital assets, planned capital investments and rehabilitation and maintenance of physical assets;*
  - (f) *include details of proposed acquisitions of financial assets or capital transfers and plans for the management of financial assets and liabilities;*
  - (g) *include multi-year projections of income and projected receipts from the sale of assets;*
  - (h) *include details of the Service Delivery Improvement Programme;*
  - (i) *include details of proposed information technology acquisition or expansion in reference to an information technology plan; and*
  - (j) *for departments, include the requirements of Chapter 1, Part III B of the Public Service Regulations, 2001." (Emphasis added)*

## **Cash Management**

5.8.14 Paragraph 15.10 of the National Treasury Regulations of March 2005 deals with Banking and Cash Management. Sub-regulation 15.10.1.1 states that *"The accounting officer is responsible for establishing systems, procedures, processes and training and awareness programmes to ensure efficient and effective banking and cash management"*. Sub-regulations 15.10.1.2 (c) further states that for

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purposes of this regulation, sound cash management includes *“avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier”*.

### **Unauthorised, irregular and fruitless and wasteful expenditure**

5.8.15 Paragraph 9.1.1 of the National Treasury Regulations of March 2005 states that:

*“An Accounting Authority/Officer of an institution must exercise all reasonable care to prevent and detect unauthorised, irregular, fruitless and wasteful expenditure, and must for this purpose implement effective, efficient and transparent process of financial and risk management.”*

### **5.9 National Treasury Practice Note no: 8 of 2007/2008**

5.9.1 The practice note is issued in terms of section 76 (4) (c) of the Public Finance Management Act and is intended to regulate the threshold values within which accounting officers / authorities may procure goods, works and services by means of petty cash, verbal / written price quotations or competitive bids.

5.9.2 Paragraph 3.4.1 of the National Treasury Practice Note 8 of 2007/2008 deals with bids above the R500 000.00 thresholds. It provides that:

*“Accounting officers / authorities should invite competitive bids for all procurement above R 500 000”*.

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5.9.3 The National Treasury Practice Note 8 of 2007/2008 further provides at paragraph 3.4.2 that:

*“competitive bids should be advertised in at least the Government Tender Bulletin and in other appropriate media should an accounting officer / authority deem it necessary to ensure greater exposure to potential bidders”.*

5.9.4 Paragraph 3.4.3 of the National Treasury Practice Note 8 of 2007/2008 deals with the issue of urgency or emergency situations. It provides as follows:

*“Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his / her delegate. Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process”.*

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## Acquisition Management

### 5.10 The Supply Chain Management Policy of PRASA, February 2009.

5.10.1 According to the Supply Chain Management (SCM) Policy dated February 2009, the following is stated regarding Conflict of Interest clause 8.1

*"If an SCM personnel or other PRASA employee or other role player, or any close family member, partner or associate of such official or other role player;*

*8.1.1 has any private or business interest in any contract to be awarded...;*

*8.1.2 ...*

*8.1.3 ...*

*8.1.4 ...*

*8.1.5 Disclose that interest to the GCEO..."*

5.10.2 Paragraph 9.3 deals with the Group CEO and states that:

*"The GCEO has the responsibility to..."*

*9.3.8 Approve appointments, irrespective of value, outside of the normal process in emergency situations or other exceptional circumstances that threaten life, property or equipment or can have a major negative impact on the smooth and safe operation of critical services of PRASA in conjunction with Exco..."*

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5.10.3 The following is stated regarding single source/confinement clause 11.3.7.

*"This occurs where the needs of the business preclude the use of the competitive bidding process and for practical reasons only one bidder is approached to quote for goods and/or services.*

*This method can only be used for:-*

- a. Appointment of professional services such as legal, financial, technical contracts and security where unique expertise and/or security are required or*
- b. If it's an emergency as defined in Clause 11.3.6 above the decision to make use of a single source shall be motivated for approval and ratifications by the GCEO."*

Invitation for bids

5.10.4 Paragraph 11.4.7 and 11.4.8 of the SCM Policy states the following in respect of invitation for bids:

*"11.4.7 Bids will be advertised in the print media or any publication if and when is necessary.*

*11.4.8 Bids will be closed at least three weeks after the date of publication. In exceptional circumstances; a short period may be stipulated. Where this is required; the approval of the GCEO must be sought"*

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Unsolicited bids

5.10.5 Paragraph 11.3.3 of the SCM policy stated the following regarding unsolicited bids:

*"Unsolicited bids are generally prohibited unless approved for consideration by the GCEO. In approving their consideration, the GCEO shall take the following into account:*

- (i) That the unsolicited bid is a unique concept or offering*
- (ii) That the offering of the bid cannot be provided efficiently through competitive bidding process*
- (iii) That there are no suppliers in the market that can provide a similar offering without copying from the unsolicited bid.*

5.10.6 According to paragraph 11.7.1 of the SCM policy the following is stated in respect of appointment of Consultants:

General

*"For the purpose of this policy; the term consultant includes; among others; consulting firms; engineering firms; construction managers; management firms; procurement agents; inspection agents; auditors; other multinational organization, investment and merchant banks, universities, research agencies, government agencies non-governmental organizations (NGOs) and individuals".*

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Bidding methods

*"The bidding methods described above in clause 11.3 will also apply when consultants need to be appointed".*

Bidding Methods

*"11.3.1 A request for quotation is allowed for procurement not exceeding R 350m. All requisitions above R 350m shall be submitted for the invitation of bids. In respect of procurement below R 350m the following apply:*

*Three written quotes should be obtained from the supplier on the database. In the event that potential suppliers are not available on the Approved Suppliers Database, quotations can be obtained from any other suppliers provided the authorization has been granted as prescribed in clause 11.2.1. above"*

5.10.7 Paragraph 11.2.1 Database Development states the following:

- "(a) SCM shall develop and maintain an Approved Supplier Database. In pursuance of this requirement, SCM shall:*
- (b) Categories the suppliers on the database according to the goods/services they provide, HDI status, locality and a record of past performance indicating whether the supplier has been restricted or not;*
- (c) Ensure that the supplier database is kept up to date;*

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- (d) *Annually, through newspapers commonly circulating locally, corporate website, and any other appropriate ways, invites prospective suppliers of goods and services, construction works and consultancy services to apply for listing as accredited prospective suppliers; and*
- (e) *This database must be used for purpose of obtaining quotations. Only in the event where none of the suppliers can meet the requirements of the quote should quotations be obtained from outside the Approved Supplier Database. A motivation to obtain quotes from suppliers not on the database is lodged with the CPO for approval before sending the quotes to the suppliers”.*

#### Request for quotations

5.10.8 Paragraph 11.3.1.2 states the following in respect of the request for quotation:

*“Request for quotations must be in writing by means of a letter, facsimile or electronically (e-mail), containing precise and detailed specifications from the onset as contained in the authorized Purchase Requisition.*

Paragraph 11.7.3 state the following in respect the approach followed on appointment of Consultants.

*The following approaches will be used for appointments of consultants;*

- (i) Quality and cost based selection (QCBS).*
- (ii) Quality based selection (QBS).*
- (iii) Selection under fixed budget.*
- (iv) Least cost selection.*
- (v) Selection based on consultants qualifications.*

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- (vi) *Single source selection.*
  - (vii) *Single of individual consultants"*

## **Late bids**

5.10.9 Paragraph 11.4.19 of the SCM Policy states the following in respect of late bids:

*"No late bid shall be considered as a rule. All late bids shall be listed in a register for late bids.*

### **5.11 National Treasury SCM Guidelines of February 2004**

5.11.1 In February 2004, the National Treasury, issued a document entitled "Supply Chain Management: A Guide for Accounting Officers/Authorities" (National Treasury SCM Guidelines). The purpose of the National Treasury SCM Guidelines was to give guidance to accounting officers in fulfilling their roles within the SCM framework.

5.11.2 Paragraph 3 of the National Treasury SCM Guidelines sets out guidelines in regard to demand management and reads as follows:

*"Demand management*

*3.1 Introduction*

*3.1.1 Demand management is the first phase of SCM. The objective is to ensure that the resources required to fulfil the needs identified in the strategic plan of the institution are delivered at the correct time, price and place and that the quantity and quality will satisfy those needs. As part of this element of SCM, a total needs assessment should be undertaken. This analysis should be included as*

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*part of the strategic planning process of the institution and hence will incorporate the future needs.*

3.1.2 *It is vital for managers to understand and utilise sound techniques to assist them in their planning, implementation and control activities. As part of the strategic plan of the institution, resources required for the fulfilment of its obligations should be clearly analysed. This includes a detailed analysis of the goods, works and services required, such as how much can be accomplished, how quickly and with what materials, equipment, etc.” (Emphasis added)*

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5.11.3 This document is applicable to all accounting officers and contains the following *principles*:

- a) *The identification of a need is the initiating trigger to a procurement process;*
- b) *The fulfilment of the need should form part of the strategic objectives of the department and a needs analysis should therefore be part of the strategic planning process;*
- c) *Sound techniques should be utilised in conducting the needs analysis; and*
- d) *The need should be linked to the budget.*

5.11.4 Paragraph 1.3.2.2 of the National Treasury SCM Guidelines states that Demand Management is the beginning of the supply chain where:

- a needs assessment is done to ensure that goods or services are acquired in order to deliver the agreed service;
- specifications are precisely determined;
- requirements are linked to the budget; and
- the supplying industry has been analysed.

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5.11.5 This phase will bring the Supply Chain practitioner close to the end user and ensures that value for money is achieved.

5.11.6 Paragraph 4 of the National Treasury SCM Guidelines states the following:

“4.7.5.1 *In urgent and emergency cases, an institution may dispense with the invitation of bids and may obtain the required goods, works or services by means of quotations by preferably making use of the database of prospective suppliers, or otherwise in any manner to the best interest of the State.*

4.7.5.2 *Urgent cases are cases where early delivery is of critical importance and the invitation of competitive bids is either impossible or impractical. (However, a lack of proper planning should not be constituted as an urgent case.)*

4.7.5.3 *Emergency cases are cases where immediate action is necessary in order to avoid a dangerous or risky situation or misery. The reasons for the urgency/emergency and for dispensing of competitive bids should be clearly recorded and approved by the accounting officer/authority or his/her delegate.”*

5.11.7 Paragraph 4.9 ‘Advertising Bids’ of the National Treasury SCM Guidelines states that, “*Timely notification of bidding opportunities is essential in competitive bidding. Bids should be advertised for at least 30 days before closure in at least the Government Tender Bulletin and in other appropriate media should an accounting officer/authority deem it necessary to ensure greater exposure to potential bidders except in urgent*

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*cases when bids may be advertised for such shorter periods as the accounting officer/authority may determine"*

5.11.8 The general approach in terms of the National Treasury SCM Guidelines dated February 2004 are captured as follows:

*Paragraph 5.4.1 states that:*

*"The accounting officer/authority should be responsible for preparing and implementing the project, for selecting the consultant, awarding and subsequently administering the contract. While the specific rules and procedures to be followed for selecting consultants depend on the circumstances of the particular case, at least the following four major considerations should guide the accounting officer's/authority's policy on the selection process:*

- *the need for high-quality services;*
- *the need for economy and efficiency;*
- *the need to give qualified consultants an opportunity to*
- *compete in providing the services; and*
- *the importance of transparency in the selection process."*

5.11.9 Paragraph 5.4.2 states that:

*"In the majority of cases, these considerations can best be addressed through competition among firms in which the selection is based both on the quality of the services to be rendered and on the cost of the services to be provided (Quality- and Cost-Based Selection [QCBS]) as described in paragraph 5.9.3. However, there are cases when QCBS is not the most appropriate method of selection. For complex or highly specialized assignments or those that invite innovations, selection based on the*

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*quality of the proposal alone (Quality-Based Selection [QBS]), would be more appropriate. Other methods of selection and the circumstances in which they are appropriate are outlined in paragraph 5.10."*

5.11.10 Paragraph 5.4.3 states that:

*"The particular method to be followed for the selection of consultants for any given project should be selected by the accounting officer/authority in accordance with the criteria outlined in this guide."*

5.11.11 Paragraph 5.4.4 states that:

*"When appropriate, the accounting officer / authority may include under the special conditions of contract, the following or similar condition:*

*A service provider may not recruit or shall not attempt to recruit an employee of the principal for purposes of preparation of the bid or for the duration of the execution of this contract or any part thereof"*

5.11.12 Paragraph 5.16.1.1.1 states that:

*"Any granting of a substantial extension of the stipulated time for performance of a contract, agreeing to any substantial modification of the scope of the services, substituting key staff, waiving the conditions of a contract, or making any changes in the contract that would in aggregate increase the original amount of the contract by more than 15 percent, will be subject to the approval of the accounting officer / authority or his / her delegate."*

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## 5.12 The Supply Chain Management Policy of PRASA, February 2009.

5.12.1 PRASA Supply Management Policy, 2009 (PRASA SCM Policy) provides at paragraph 11.3.2 that *"a competitive bidding process is applicable when the estimated total value of the requirement is more than R350 million. This process must be followed irrespective of the type of service or product required."*

5.12.2 In respect of bids below R350m, three written quotations must be obtained from the suppliers on the database. Only in the event where none of the suppliers can meet the requirements, should quotations be obtained from suppliers not on the database whereby a motivation must be lodged with the Chief Procurement Officer for approval.

5.12.3 PRASA SCM Policy provides further at paragraph 11.4.7 for the bids to be advertised in the print media or any publication if and when necessary.

5.12.4 Paragraph 11.3.1 of the PRASA SCM Policy provides that *"a request for quotation is allowed for procurement not exceeding R350 million. All requisitions above R350 million shall be submitted for the invitation of bids."*

5.12.5 Paragraph 11.3.1.1 of the PRASA SCM Policy provides that *"in respect of procurement of below R350 million three written quotes should be obtained from suppliers on the database. In the event that potential suppliers are not available on the Approved Supplier Database, quotations can be obtained from any other suppliers provided the authorisation has been granted as prescribed in clause 11.2.1"* (of the PRASA SCM Policy).

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5.12.6 Paragraph 11.3.3 of the PRASA SCM Policy provides that *“unsolicited bids are generally prohibited unless approved for consideration by the GCEO. In approving their consideration, the GCEO shall take the following into account:*

- *That the unsolicited bid is a unique concept or offering*
- *That the offering of the bid cannot be provided efficiently through competitive bidding processes*
- *That there are no suppliers in the market that can provide a similar offering without copying from the unsolicited bid*

5.12.7 Paragraph 11.3.5 of the SCM Policy provide that :

*“Purchases made for ‘emergency situations’ where competitive bidding would be inappropriate is limited to the following types of situations:*

- *Disasters (e.g damage from cyclones, floods, fire (sic), etc*
- *Systems failures (including supporting items which could affect the system)*
- *Security risk*

*During emergencies the required goods, works or services may be obtained by means of quotations by preferably making use of the departmental supplier database.*

*A motivation of the emergency purchase should be submitted to the GCEO for ratification.”*

5.12.8 Paragraph 11.3.6 of the PRASA SCM Policy provides that:

*“Sole sourcing exist where there is only one source (supplier) available in the market. A sole source may make a special product or technology that no one else does. Where such a situation exist, competitive bidding is not advisable.*

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*All sole sourcing motivations must be submitted to the GCEO or for approval prior to entering negotiations with the sole source"*

5.12.9 Paragraph 11.3.7 of the PRASA SCM Policy provides that single source/confinement:

*"Occurs where the needs of the business preclude the use of competitive bidding process and for practical reasons only one bidder is approached to quote for goods and/or services.*

*This method can only be used for : -*

- *Appointment of professional services such as legal, financial, technical contracts and security where unique expertise and/or security are required or*
- *If it is an emergency as defined in Clause 11.3.6 above*

*The decision to make use of a single source shall be motivated for approval and ratification by the GCEO."*

5.12.10 Paragraph 11.4.19 of the PRASA SCM Policy provides that:

*"No late bids shall be considered as a rule. All late bids shall be register for late bids"*

5.12.11 Paragraph 8.1 of the PRASA SCM Policy provides that:

*"If a SCM personnel or other PRASA employee or other role player, or any close family member, partner or associate or such official or other role player;*

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- 8.1.1 *has any private or business interest in any contract to be awarded;*
- 8.1.2 *conduct activities that could reflect negatively on the reputation of the agency and its personnel ..."*

### 5.13 Powers and Authority of the Board and Delegation of Authority

#### Powers and Duties of the Board

- 5.13.1 The Board is empowered to exercise all the powers and authorities to lead, control and manage PRASA and to delegate any or all of such powers to an official(s), employee(s) and any other person and/or to a committee(s) of PRASA, subject to existing PRASA Policies and the provision set out herein.
- 5.13.2 The approval of the Board shall be obtained for all matters that are beyond the authority delegated herein.
- 5.13.3 According to the tender approval there are various categories set out in the Delegation of Authority ranging from R10 million to R100 million for the GCEO.
- 5.13.4 The threshold for Operating tenders:  
GCEO: R100 million;  
CEO's of Subsidiaries: R50 million;  
CFO: R50 million.
- 5.13.5 The threshold for Maintenance and material  
CEO's of Subsidiaries: R20 million;  
CFO: R20 million;  
CPO: R10 million.

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5.14 ***Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49***

5.14.1 The Constitutional court has stated that section 195 of the Constitution imposes a positive duty on state functionaries to take steps to arrest in amending or apparent irregularity or unlawfulness, which duty primarily flows from the requirement of a high professional and ethical standard imposed by section 191(1)(f) and (g). In the case, Justice Skweyiya held that :

*“Section 195 provides for a number of important values to guide decision makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues.*

*This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.*

*Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to “respect, protect, promote and fulfil the rights in the Bill of Rights.” As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where*

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*faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration"*

5.14.2 Accordingly, when considering entering into, extending and cancelling contracts, PRASA, was and still is required to exercise a high standard of professional ethics and act in accordance with the duty required of state functionary to correct an irregularity once it is brought to its attention.

5.14.3 It is also worth mentioning section 33 of the Constitution imposing a duty on any administrator to ensure just administrative action, incorporating among others, the right to be lawful, reasonable and procedurally fair. This duty is critical with regard to the cancellation of contracts. It does not mean of course that summary cancellation of contracts is prohibited where there are rational reasons and reasonable grounds. The permissibility of reasonable and rational deviations was canvassed fully by the Constitutional Court in *Allpay Consolidated Investment Holdings (PTY)Ltd v Chief Executive Officer of the South African Social Security Agency* discussed in detail below.

### **Labour relations irregularities**

#### **5.15 The Constitution**

5.15.1 Section 195(1) provides that :

*"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*

- 
- a) *A high standard of professional ethics must be maintained;*
  - b) *The public administration must be accountable..."*

5.15.2 Section 23(1) provides that:

*"Everyone has the right to fair labour practice".*

#### 5.16 **Labour Relations Act 66 of 1995**

5.16.1 Paragraph 2 of schedule 7 of the Labour Relation Act states the following with regards to unfair labour practices:

*"Residual unfair labour practices*

- (1) *For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee,*
  - Involving-*
    - (a) *The unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;*
    - (b) *the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;*
    - (c) *the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;*

- 
- (d) *the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement."*

5.16.2 The Labour Relations Act requires that fair procedures be followed in dismissing an employee. Schedule 8, paragraph 4 of the Labour Relations Act states the following:

*Fair procedure*

*"Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.*

**5.17 Metrorail Recruitment and Selection Policy, 01 October 2004**

5.17.1 Paragraph 4 of the Recruitment and Selection Policy states that:

*"In achieving the vision and mission of Metrorail Recruitment and Selection will adhere to the following principles:-*

- *Recruitment and Selection will support and enable business needs;*
- *Employment Equity is a key driver in the recruitment and selection process of Metrorail;*

- 
- *Ensure that all employment practices are fair, equitable and transparent avoiding all forms of favouritism and nepotism;*

5.17.2 Paragraph 5 deals with the sourcing of candidates and states that:

*"A pool of potential suitable candidates must be obtained through transparent sourcing and communication techniques that are appropriate to the target audience being sourced from.*

5.17.3 Paragraph 5.3 deals with the sourcing of candidates external to Metrorail and states that:

*"Should the Recruitment and Selection process for internal candidates not have identified a suitably competent candidate for appointment candidates may be sourced externally for Metrorail..."*

#### **5.18 Disciplinary Code and Procedure of Metrorail, 11 December 2003.**

5.18.1 Paragraph 4.4 provides that:

*"Disciplinary hearing shall be conducted and finalized within a period of thirty (30) calendar days after the incident is brought to Management's attention. Should extension of this period be sought, permission shall be sought from the Regional Managers/Executive Managers Office upon furnishing substantive and legitimate grounds for the delay. If not obtained, the case will be withdrawn".*

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5.18.2 Paragraph 11.1 provides that:

*"The Company shall have the right to suspend an employee with pay prior to the determination of the disciplinary action where, in the opinion of Management, an offence by an employee is regarded as serious, and/or that the continued presence of the employee at the Company's Premises may prejudice the interest of the Company, the employee, other employees or hamper an investigation. The suspension period should(sp) not exceed a maximum of thirty (30) calendar days or the period is to be exceeded permission therefore must be obtained from the GCEO".*

#### 5.19 **Railway Safety Regulator Act, 16 of 2002**

5.19.1 Section 38(1) of the Railway Safety Regulator Act deals with Railway occurrence investigations and states that:

*"An operator must investigate every railway occurrence that takes place directly or indirectly in connection with that operators railway operations, among other things to identify the root cause or causes thereof, within a reasonable time after the occurrence".*

#### **Conflict of interest and Nepotism/ Cronyism**

5.20 **Paragraph 8 of PRASA's SCM Policy states the following:**

5.20.1 *If an SCM personnel or other PRASA employee or other role player, or any close family member. Partner or associate of such official or other role player:*

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- (a) *Has any private or business interest in any contract to be rewarded;*
  - (b) *Conduct activities that could reflect negatively on the reputation of the Agency and its personnel;*
  - (c) *Participating in any activity that might lead to the disclosure to the Agency's proprietary information or;*
  - (d) *Conduct outside work for suppliers; That staff member or other role player must:-*
    - (i) *Disclose that interest to the GCEO; and*
    - (ii) *Withdraw from participating in any manner whatsoever in the process relating to that contract."*

5.20.2 With regard to alleged nepotism and cronyism, the Prevention and Combatting of Corrupt Activities Act (PCCAA) prohibits and classifies nepotism and cronyism as corrupt activities.

#### **5.21 Jurisprudence and Touchstones from previous Public Protector reports:**

5.21.1 On the issue of the duty of state functionaries to rectify unlawfulness and the duty of state functionaries to comply with procurement regulatory frameworks as well as the states functionaries' duty to uphold the rule of law. I considered and applied the judgments of the Constitutional Court in the case of *Allpay Consolidated Investment Holdings (PTY)Ltd v Chief Executive Officer of the South African Social Security Agency (No 1) (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC) (29 November 2013)* and *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal (CCT 10/13) [2013] ZACC 49*.

5.21.2 Touch stones or principles from previous Public Protector Reports were also considered. In this regard, principles regarding different responsibilities and

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processes in a valid supply chain process discussed in reports such as *'Against the Rules Too'*, a report on allegations of improper procurement of the lease of office accommodation for the SAPS in the Sanlam Middestad building in Pretoria and the Transnet Building in Durban by the National Commissioner of the South African Police Service (SAPS) and the Department of Public Works (DPW), were considered. In this report I made the following observations; that it was important for an interpretation of the PFMA requirements to organs of state, including Treasury Regulations issued in pursuit of the PFMA, to transcend a mechanical adherence to the letter of the law and is aligned with the spirit and purpose of section 217 of the Constitution.

- 5.21.3 A further point made in this report is that the process of awarding contracts, particularly contracts worth millions of rands, as is the case in point, through deviations must be discouraged as it is open to abuse. The award of contracts of huge financial value seems to be a growing and worrying trend. While the practice may not necessarily be unlawful, the use of this avenue in many of the circumstances, including the present, does not seem justified. Not only do such practices undermine fair competition, there is no doubt that there is a growing negative impact on quality and cost effective pricing, and accordingly, the objectives of section 217 of the Constitution.

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## 6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

### 6.1 Complaint 1: Regarding PRASA's alleged improper extension to other stations nationally, a tender for the installation of high speed passenger gates worth R800 million to Siyangena Technologies in 2009/2010 initially advertised for the Doornfontein station in Gauteng:

#### 6.1.1 Common cause

6.1.1.1 It is common cause that PRASA, through Intersite a subsidiary of its predecessor SARCC, awarded a tender for the installation of high speed passenger gates at Nasrec and Doornfontein stations to Siyangena Technologies per contract number SG/GATES/003/2009. PRASA conceded in its response received on 29 August 2013 that the tender was later extended to seven other stations across the country. Those are Cape Town, Rhodesfield, Windermere, Langa, Bridge City, Moses Mabhida and Orlando.

#### 6.1.2 Issues in dispute

6.1.2.1 The key issue for my factual determination was whether or not the 2010 Soccer World Cup PRASA readiness was justification for foregoing tender requirements for bulk procurement. I further had to make a determination on whether or not there was no competitive tender process at all for the scope expansion. PRASA denied that there was no bidding process, submitting that a closed tender was extended to the original four service providers who had submitted bids for the original two 2010 Soccer World Cup stations speed gates project.

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- 6.1.2.2 The justification offered by Mr Montana for increasing the scope to cover seven more stations was that it was discovered that these stations which had also been designated as World Cup Stations had excluded the critical work of installing modern speed gates. In his submissions, including a response to a notice issued under section 7(9) of the Public Protector Act, Mr Montana submitted that the extension was done to ensure World Cup 2010 readiness and that the use of the closed tender complied with the SCM Policy requirement of a competitive process that is open, transparent and fair. He provided some of the tender documents to support his submission.
- 6.1.2.3 I must state upfront, that the documents submitted by mr Montana were not always reliable as some crucial documents were undated and unsigned. Notwithstanding that, the documents disclose that the roll out from two Gauteng stations to national took place in 2011, well after the hosting of the 2010 Soccer World Cup, which took place in June and July 2010. However, the documents also confirm PRASA's submission that there was a closed tender process.
- 6.1.2.4 PRASA submitted that the following two (2) tenderers met the minimum technical requirements for the two Gauteng stations , for which the tender had been advertised:

Table: Tenders complying

No.	Supplier	Tender Price (Excl VAT and contingency)	Tender Price (Incl VAT and contingency)	Tender delivery completion
1.	Protea Coin	R613 095 371.97	R698 928 724.04	Five months
2.	Siyangena Technologies	R965 304 413.71	R1 100 447 031.56	Five months

- 6.1.2.5 It further submitted that after a diligent evaluation process, the tender was awarded to Siyangena Technologies.
- 6.1.2.6 The documents relating to the initial appointment of tender number SG/GATES/003/2009 supply and installation of Access Gates (Speedstiles) at Doornfontein and Nasrec stations were not provided.
- 6.1.2.7 The documents submitted by PRASA show that an Intersite adver with tender number SG/GATES/003/2009, was issued in an unknown newspaper and on an unknown date. The same indicate the tender to be for "Supply and Installation of Access Gates (Speedstiles) at Doornfontein and Nasrec Stations – Specialised".
- 6.1.2.8 One of the documents, provided to my office by PRASA, is an unsigned letter dated **4 November 2010**, prepared by Ms Matshidiso Mosholi, Manager in Procurement, addressed to tenderer concerning the Supply and Installation of Access Gates at Doornfontein and Nasrec tender. The letter stated that PRASA

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wished to rollout the project to priority corridors nationwide. As a result the tenderers were invited to a closed briefing session to be held at Umjantshi House on **8 November 2010**. If this letter is to be accepted as authentic. The closed tender process for the roll out happened long after the 2010 Soccer World Cup had taken place. As can be noted, the notification went out in November 2010, about four months after the Soccer World Cup.

- 6.1.2.9 The confirmation that the roll out took place after the World Cup, is further provided by an undated and unsigned Submission for Adjudication. The undated and unsigned documents left me uneasy and in doubt of the reliability and authenticity of such documents. Notwithstanding the doubtful authenticity of unsigned documents, the submission confirms that there was a closed tender process for 7 stations across the country with a **closing date of 17 November 2010**, confined to the four companies that had submitted bids for the original project for Doornfontein and Nasrec in Gauteng. It's also worth noting that the 2010 World Cup is not mentioned as a justification for the roll out, but only mentioned in tracing the genesis of the High Speed Gate initiative. In the Submission for Adjudication the following was stated:

*"On 30 June 2009 PRASA, through Intersite, went out on tender SG/GATES/003/2009 for supply and installation of access gates Doornfontein and Nasrec Stations: 2010 World Cup.*

*A decision was made then to extend the scope of this engagement to also include seven other critical 2010 stations including Cape Town, Rhodesfield, Windermere, Langa, Bridge City, Moses Mabida and Orlando.*

*To roll out the project to the entire network a confined tender was called among the four companies that initially responded to the original open tender viz. Omega Fire and Security, Marohi-KgT Consortium, Siyangena Technologies and Protea Coin.*

*Proposals were sought and received from all four vendors. All four vendors were provided a list of Large, Medium and Small stations to be rolled out. The view was to have a sense of the total cost of the entire project so that a decision of financing, implementation and prioritisation could be made."*

Table: Procedures

<i>Date advertised</i>	<i>Confinement to companies that tendered initially</i>
<i>Method of Advertising</i>	<i>N/A</i>
<i>Briefing session</i>	<i>10/11/2010</i>
<i>Closing date &amp; time</i>	<i>17/11/2010 at 10h00</i>
<i>Closing Venue</i>	<i>30 Wolmarans Street Braamfontein</i>
<i>Number of tenders issued/sold</i>	<i>4</i>
<i>Numbers of tenders received</i>	<i>4</i>
<i>How tenders issued/sold</i>	<i>In sealed envelopes in the Tender Box</i>
<i>Tenders received from</i>	<i>Marothi KgT Consortium, Siyangena Technologie, Protea Coin and Omega Fire and Security</i>
<i>Validity expiry date</i>	<i>31 March 2011</i>

6.1.2.10 The documents further show that the implementation of the roll out followed a year later in 2011. In a document signed by the Chairperson of the CTPC on 20 February 2011 it was stated that a meeting was convened on 14 February 2011 and a resolution was taken that they concurred with the recommendation that business be awarded to Siyangena Technologies in the amount of R1 100 447

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031.56 (R1.1billion) inclusive of VAT subject to the recommendations to clean up the following:

- That the respective end-user sign the documents;
- That a list of stations as per Annexure A be clearly attached;
- That the price differentials be explained.
- That the background captures the original prices of the pilot project.
- Confirmation that funds are available.
- Member E Swanepoel assists in cleaning up the document and to align it for GCEO's approval.
- That the CPO, the Chairperson and Tiro Holele avail themselves and that all of the above is done.

6.1.2.11 An undated, unsigned Submission for Adjudication provides for the appointment of Siyangena Technologies for the supply and installation of access gates for the amount of R1 100 447 031.56. In the submission it is further recommended that: *"The quoted price be considered indicative subject to negotiations with the preferred bidder and SCM puts together a team inclusive of Technical, legal and finance to negotiate price, funding and implementation conditions."*

6.1.2.12 There was another copy of an undated PRASA Board of Control Resolution of PRASA Board, signed by Mr T Mohube, Company Secretary which states that at the special PRASA Board of Control meeting held on 28 March 2011, the PRASA Board of Control considered the submission from the FCP Committee and having satisfied itself that the tender process that was followed was in line with the SCM Policy and was fair, transparent and objective, resolved, *inter alia*, the following:

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*“Siyangena Technologies should be appointed as a preferred bidder for the Supply and Installation of a Speed Gates in the total amount of R1, 959, 642, 353.00 including VAT. The price includes Public Address, Electronic Display PRASA Boards, Help Points, CCTV and Monitoring as well as Smoke Detection all integrated as a system through Network.”*

6.1.2.13 In view of the fact that the roll out happened about a year after the 2010 Soccer World Cup, I am unable to accept Mr Montana’s submission that the roll out was for meeting the 2010 Soccer World Cup needs. I must also indicate that Mr Montana’s changing narrative regarding what happened is a cause of concern regarding honesty. Regarding whether or not there was a closed tender, I have accepted the evidence, though costing of undated and unsigned documents, purely because the original procurement documents have not been provided.

**6.2 Complaint 2: Regarding PRASA’s alleged advance payment to a developer of the City Mall for the construction of an underground train station on the Bridge City Project without proper authorisation during the periods 2008 to 2010:**

6.2.1 Common cause

6.2.1.1 It is common cause that PRASA was involved in the Bridge City Urban Renewal Project. This was confirmed in PRASA’s response received on 29 August 2013 and was further confirmed by the GCEO in his response dated 5 June 2015 to the notice I issued in terms of section 7(9) of the Public Protector Act. The GCEO also informed that PRASA invested over R1,2 billion in the project which included construction of station box for R100 million which was successfully completed in 2009, state of the art underground rail station completed in 2011 at the cost of

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R150 million and the laying of rail line between Bridge City and Duff's Road costing over R640 million.

6.2.2 Issues in dispute

- 6.2.2.1 What I had to determine was whether or not PRASA irregularly made an advance payment of R100 million and received no value for it resulting in fruitless and wasteful expenditure.
- 6.2.2.2 In his initial response received on 29 August 2013, Mr Montana repeated in response in terms of section 7(9) of the Public Protector Act, and confirmed that PRASA was a partner in the Bridge City Urban Renewal Project conceived and executed as a Public Private Partnership Project, but denied incurring or making any advance payment.
- 6.2.2.3 A Development Agreement entered into on 18 December 2007 between Crowie (the developer) and SARCC (PRASA's predecessor) and the Development Agreement entered into on 22 February 2010 between PRASA and the same developer do not have any clause providing for advance payments.
- 6.2.2.4 Unfortunately, apart from denying the allegations PRASA did not favour the investigation team with a payment schedule. I am accordingly unable to make a determination if any advance payment was made regularly or irregularly. I have also found no evidence of personal gain to Mr. Montana.

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**6.3 Complaint 3: Regarding the alleged improper extension of a contract awarded to Siemens for the Dark Fibre and Integrated Communication Systems tender amounting to R800 million nationally when it had only been advertised in Gauteng:**

6.3.1 Common cause

6.3.1.1 It is common cause that a Dark Fibre and Integrated Communications Systems contract duly awarded to Siemens for two stations in the Gauteng Region, was extended without going to tender to the Western Cape and Durban Regions. This was conceded by Mr Montana in his submission on 29 August 2013 and response to the notice issued in terms of section 7(9) of the Public Protector Act in June 2015

6.3.2 Issues in dispute

6.3.2.1 The issues for my determination were whether or not the total amount involved was R800 million as alleged and if the circumstances for the scope extension, without going to tender complied with the urgency requirements of the SCM Policy as submitted by PRASA management.

6.3.2.2 PRASA denied the allegation that the contract awarded to Siemens was for R800 million as alleged. In this regard PRASA submitted information which indicated that all in all Siemens was awarded two major contracts. According to this information the first contract was for Dark Fibre which was for the amount of R121 422 000.00 and that the second contract was for the Integrated Communication Systems for the amount of over R135 392 00.00.

6.3.2.3 I must indicate that the authenticity of evidence submitted by PRASA comprising of memoranda, tender documents, notices to proceed and contracts. It is a great source of concern as key documents are undated and unsigned. That having been said, the evidence confirmed that the total contract amount was R256 814 000.00 made of the following, (refer to table below).

The table below summarises the appointment in respect of the two projects.

Table: Appointment of Siemens

No.	REGION	DARK FIBRE	ICS
1.	Western Cape	R28 500 000.00	R36 000 000.00
2.	KZN	R30 329 000.00	R25 000 000.00
3.	Tshwane	R22 363 000.00	R23 000 000.00
4.	WITS	R40 230 000.00	R51 392 000.00
		R121 422 000.00	R135 392 000.00

**Dark Fibre**

6.3.2.4 The documents show that there was an agreement entered into between PRASA and Siemens. The contract was for WT1538 Dark Fibre backbone at Wits and PR1537 Tshwane regions project. Clause 4 of the contracts stated that the contractor shall provide all supervision, labour, Materials, Plant and Contractor's Equipment which may be required.

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- 6.3.2.5 Clause 5 of the same contract, states that the Contractor shall carry out design to the extent specified. The Contractor shall promptly submit to the Employer all designs prepared by him.
- 6.3.2.6 The contract was signed by the Siemens representative on 11 February 2009, Clifford Klaas Div. Director Finance & Admin and Ilesavel Pillay Div. Managing Director. The contract was signed by TL Montana on behalf of SARCC on 12 March 2009. The value of the contract was R62 593 000.00 inclusive of VAT.
- 6.3.2.7 In respect of design, supply & installation of Dark Fibre we noted the Memorandum titled Tender Advice's. The table below was on the memorandum.

Table: Tender dates

	Date of tender advice		Amount ( R )
	10 February 2009	Cape Town	R28 500 000.00
	10 February 2009		R30 329 000.00
TOTAL			R58 829 000.00

- 6.3.2.8 The Memorandum for the Cape Town region with a total value of R28 500 000.00 (incl VAT) was addressed to Luyanda Gantsho, General Manager (Infrastructure & Facilities Development), Woodmead from TPC Secretariat. The resolution was stated as approved and it was signed by Matshidiso Mosholi Manager Procurement.

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6.3.2.9 The second Memorandum for the KZN region for a total value of R30 329 000 (incl VAT) was addressed to Luyanda Gantsho, General Manager (Infrastructure & Facilities Development), Woodmead from TPC Secretariat. The resolution was stated as approved and it was signed by Matshidiso Mosholi Manager Procurement.

6.3.2.10 On perusal of the documents obtained from PRASA, I have noted that there was an undated recommendation report addressed to the CEO from Chief Procurement Officer. The subject on the letter was extension of Siemens appointment for installation of Dark Fibre Backbone. The report was signed by Chief Procurement Officer, Ms. Tara Ngubane on 10 February 2009 and Acting Chief Executive Officer, Mr David Kekana. We noted that under scope of work section 1 it stated that:

*"1. Scope of work*

*This project entails the installation of a Dark Fibre backbone in the KZN region, to support the installation of Passenger Information and Communication systems at key 2010 FIFA World Cup stations."*

*2. Background*

*In the case of support Passenger Communication and Information systems Infrastructure for the upgrade of key 2010 support stations, an ETC budget allocation of R30.329m was approved for the installation of Dark Fibre backbone in the KZN region."*

Table: Proposed Contract Amendment

			<i>ETC Approved Amount (MTEF)</i>
<i>Current Approved Turnkey Contract</i>	<i>Design, Supply and installation of Dark Fibre Backbone (Gauteng Region)</i>		<i>R40.230M R22.363M</i>
<i>Proposed Extended Contract Amount</i>	<i>Design, Supply And installation of Dark Fibre Backbone (KZN Region)</i>		<i>R30.329M</i>
<i>Proposed Total Contract Value</i>			<i>R92.922M (VAT incl)</i>

*Motivation*

*SARCC believes that standardization of the ICS communication platform and equipment specifications will have a long-term beneficial effect on the operations of SARCC. Siemens have been appointed only for the installation of the support Dark Fibre backbone for the Gauteng region. Similar Dark Fibre backbone support is required for KZN region.*

*The benefits will accrue from:*

- Lower prices due to economic of scale.*
- Increase in the negotiation power to SARCC, to further drive the price down.*

- 
- *Direct cost and time benefit for SARCC, through the savings of costs associated with the procurement process.*
  - *Benefit of a single, reputable supplier, with capacity to deliver the project.*
  - *Standardization and uniformity in quality standards.*

*Recommendation*

*The approval is hereby sought to confine the supply and installation of Dark Fibre backbone to Siemens Ltd."*

6.3.2.22 I have obtained and reviewed an undated recommendation report addressed to the CEO from the CPO. The subject on the letter was Extension of Siemens appointment for installation of Dark Fibre backbone in Western Cape region. It was signed by the Chief Procurement Officer, Ms Tara Ngubane on 20 February 2009 and Acting Chief Executive Officer, Mr David Kekana. The letter stated the following:

*"Scope of work*

*This project entails the installation of a Dark Fibre backbone in the Western Cape region, to support the installation of Passenger Information and Communication systems at key 2010 FIFA World Cup stations."*

*Background*

*In the case of support Passenger Communication and Information systems Infrastructure for the upgrade of key 2010 support stations, an ETC budget allocation of R28.500M was approved for the installation of Dark Fibre backbone in the KZN region."*

Table: Allocation for regions

<i>Approved</i>	<i>Design, Supply and installation of Dark Fibre Backbone (Gauteng)</i>		<i>R40.230M R22.363M</i>
<i>Extended Amount for</i>	<i>Design, Supply and installation of Dark Fibre Backbone (KZN Region)</i>		<i>R30.329M</i>
<i>Proposed Extended</i>	<i>Design, Supply and installation of Dark Fibre Backbone Cape</i>		<i>R28.500M</i>
<i>Proposed Total Contract</i>			<i>R121.422m(VAT In</i>

*Motivation*

*SARCC believes that standardization of the ICS communication platform and equipment specifications will have a long-term beneficial effect on the operations of SARCC. Siemens have been appointed only for the installation of the support Dark Fibre backbone for the Gauteng region. Similar Dark Fibre backbone support is required for Western Cape region.*

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*The benefits will accrue from:*

- *Lower prices due to economic of scale.*
- *Increase in the negotiation power to SARCC, to further drive the price down.*
- *Direct cost and time benefit for SARCC, through the savings of costs associated with the procurement process.*
- *Benefit of a single, reputable supplier, with capacity to deliver the project.*
- *Standardization and uniformity in quality standards.*

*Recommendation*

*Chief Executive Officer's approval is hereby sought to confine the supply and installation of the Cape Town Dark Fibre backbone to Siemens Ltd. At the total contract price of R 28.500 m including VAT.*

- 6.3.2.23 The evidence at my disposal does not indicate that PRASA awarded the Dark Fibre and Integrated Communication system tender amounting to R800 million to Siemens as alleged. I am therefore inclined to rely on the amounts provided by PRASA in the absence of any evidence in the contrary in this regard.
- 6.3.2.24 The issue as to whether the initial awarding of the tender to Siemens for the Gauteng Region and the subsequent extension of the tender to cover the Western Cape and the Durban regions was irregular as alleged, will be resolved when measuring the conduct of PRASA against the relevant rules in the following chapter as that is a legal determination.

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**6.4 Complaint 4: Regarding PRASA's alleged improper termination of all contracts for cleaning services and the subsequent appointment of Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services:**

6.4.1 Common cause

6.4.1.1 It is common cause that PRASA summarily terminated the contracts of seven(7) cleaning service providers for Park Station in Johannesburg by letters dated 14 March 2012 following an unscheduled inspection by Mr Montana and colleagues and replaced them with Reakgona Commercial and Industry Hygiene (Reakgona) and Katanga Cleaning Services (Katanga), on 15 and 16 April 2012 respectively for contracts worth **R640 067.41** and **R640 067.41** respectively. It is not in dispute that the two companies took over immediately on 15 March 2012.

6.4.1.2 It is also common cause that the contracts, which were similar, provided for the contractors to be given a 24/48 hour notice to rectify any breach and that summary termination would be considered if the breach is material.

6.4.1.3 Mr Montana admitted that he terminated the contracts of the seven companies on the spot when he and some of his managers took an unscheduled visit to Park Station and found it to be filthy. He further conceded that Reakgona and Katanga were contracted without any tender or competitive process and submitted that this was in line with emergency provisions as PRASA could not be without cleaning services with the seven erstwhile contractors having been summarily dismissed.

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6.4.2 Issues in dispute

6.4.2.1 The question for my determination was whether or not the conduct of the seven companies entitled PRASA override their right to a written 48 hour ratification notice in terms of clause 8.1 of the contract (Dyno contract, which I have assumed was standard) and entitled the PRASA GCEO to invoke clause 8.2 of the contract providing that:

*"In the event of a breach that poses any immediate threat or damage to person or property, the other party shall be entitled to cancel the contract with a 24 hour notice to the defaulting party."*

6.4.2.2 Unfortunately, no evidence has been submitted by PRASA to support the argument of gross breach of contract "*posing an immediate threat or damage to person or property*", which is in line with paragraph 11.3.5 of the PRASA SCM Policy permitting deviation to avoid a dangerous situation. There has been no argument made by PRASA indicating a history of dereliction of duty by the seven companies and their engagement with a view to ensure that non-compliance is rectified.

6.4.2.3 The letters of termination sent to each of the seven companies do not support PRASA's argument as they do not say anything about the reason for contract termination or deviation from the 48 hour rectification notice. Each letter simply states:

*"We regret to inform you that your contract with PRASA CRES previously known as Intersite Property Management Services, have been terminated with immediate effect starting from today 2012 March 14."*

6.4.2.4 The letters were sent to the following companies:

Table: Letters to companies

	Companies	Date of letter
	Dyno Cleaning	14 March 2012
	Rainbow Rail Cleaning Services	14 March 2012
	Keewave Trading 40 CC	14 March 2012
	Kokobela	14 March 2012
	Machate Commercial and Industrial cleaning	14 March 2012
	Siyakhona Business Enterprise cc	14 March 2012
	Nyota Security and cleaning services	14 March 2012

6.4.2.5 The submission made on 29 March 2012 motivating for the appointment of Reakgona on a deviation basis, due to an emergency basis, justifies the termination of the seven contracts on the breach of contract by the seven contractors on, among others, *threatening PRASA's operating licence by creating a hazard* on the following basis:

*"During an unscheduled site visit to Park Station by the CEO and Executive management of PRASA CRES on 14th March 2012, the following serious shortcomings were identified:*

- a) *generally poor condition of the station as far as cleanliness was concerned;*

- 
- b) *poor hygiene and safety conditions affecting commuters and employees;*
  - c) *poor performance and/or abandonment of posts by the contracted cleaning contractors; and*
  - d) *generally poor and/ or lack of safety critical maintenance at the station".*

6.4.2.6 While the submission by PRASA that a filthy state of the Johannesburg Park Station could present a health hazard to both employees of PRASA and the commuters, is sound and reasonable, the evidence does not prove that the filthiness of the station had reached hazardous proportions and that rectification of such filthiness within 48 hours in compliance with clause 8 was impossible to comply with when the contracts were terminated. It also does not justify blanket arbitrary treatment of all seven contractors.

6.4.2.7 I also find it difficult to believe that the seven companies were equally culpable for the state of affairs at Park Station. The failure to hold a proper meeting with minutes detailing the conditions at the station and role of each cleaning company contribute to the difficulty I have in accepting that invoking clause 8 was impossible or would have perpetuated a hazardous situation for staff and commuters.

6.4.2.8 The evidence also shows that the appointment of Reakgona and Katanga was done on the basis of an emergency procurement memorandum, duly submitted and approved by Mr Montana on 23 April 2012. The submissions as indicated earlier, links the emergency to the termination of the seven previous contracts based on the hazardous situation created by the failure by the seven companies to comply with their contractual obligations.

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- 6.4.2.9 Having evaluated all the evidence before me and in the absence of a history of dereliction of duty and detailed violations by each of the seven contractors, I am unable to accept the argument that the station was in such a condition that the 48 hour rectification notice could not remedy the situation. I am also unable to accept that Reakgoma and the other were appointed to address an emergency as the emergency was self created by the PRASA GCEO's decision to summarily terminate existing contracts without due process.
- 6.4.2.10 Regarding whether or not PRASA, having terminated the contracts unduly failed to pay the contractors on time, I am unable to make a finding as this aspect was not investigated.
- 6.4.2.11 I have also not discovered or been provided with any evidence regarding the allegation that Reakgona was awarded the contract due to the entity's connection with the GCEO's Mr Montana's submission in response to the notice I issued in terms of section 7(9) of the Public Protector Act, that he does not know of any or has ever met a Mr Modiselle in his life.

**6.5 Complaint 5: Regarding the alleged irregular appointment of Sidas Security on security tender in replacement of National Force Security on the GCEO's instruction:**

6.5.1 Common cause

- 6.5.1.1 It is common cause that Sidas Security was appointed by PRASA on a security tender on 20 April 2009 valued at **R3 094 261.00** to replace National Force Security.

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- 6.5.1.2 It is also common cause that the appointment of Sidas Security was not preceded by an open tender or quotation process.
- 6.5.1.3 In its response received on 29 August 2013, PRASA conceded that the appointment of Sidas Security as a security service provider was not in accordance with PRASA's Supply Chain Management Policy and that the PRASA management had already made that determination.
- 6.5.1.4 PRASA further advised that, on discovery of the irregularity, management had instituted an investigation around the appointment of Sidas Security which investigation confirmed the irregular appointment of Sidas Security as well as its poor service and the contract was terminated while appropriate disciplinary steps were taken against the staff members who were implicated.
- 6.5.2 Issues in dispute
- 6.5.2.1 The only matter for my determination was whether the irregular appointment of Sidas Security was on the authority of Mr Montana as the GCEO as alleged.
- 6.5.2.2 In his response to the notice I issued in terms of section 7(9) of the Public Protector Act, Mr Montana denied that Sidas Security was unlawfully appointed on his instructions as alleged.
- 6.5.2.3 To corroborate his version, Mr Montana submitted a Report by Deloitte wherein it was made clear that many security contracts at the time were procured when Metrorail was still part of Transnet and were managed at the Regional level not at SARCC or PRASA Group level. He also contended that the Deloitte Report

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identifies the people who were involved within the Regions for procurement and termination of the security contracts.

6.5.2.4 Mr Montana's version was corroborated by the tender documents being minutes and memoranda as well as a PRASA investigative report dated July 2009.

6.5.2.5 It was further corroborated by the response of Mr Chris Mloi and Mr Ronnie Khumalo in their responses to the notices I issued to them in terms of section 7(9) of the Public Protector Act dated 24 July 2015, who both confirmed that Mr Montana did not issue any instructions. In the circumstances I am persuaded that Mr Montana was not involved in the appointment of Sidas Security.

## **6.6 Complaint 6: Regarding PRASA's alleged improper appointment of Vimtsire Security Services on tender number 525/2010/GAU/PS:**

### 6.6.1 Common cause

6.6.1.1 It is common cause that Mr Montana appointed Vimtsire Security Services on security tender No: 525/2010/GAU/PS on DATE without an open tender process.

6.6.1.2 In its response received on 29 August 2013, PRASA conceded that it appointed Vimtsire Security Services in terms of Tender No: 525/2010/GAU/PS. PRASA further advised that Vimtsire Security Services was appointed for an amount of R766 080.00 (VAT inclusive), per month, for the Krugersdorp Station.

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6.6.2 Issues in dispute

6.6.2.1 The matter for my determination was whether circumstances existed justifying deviation from an open tender process as envisaged in paragraph 11.3.5 of PRASA SCM Policy.

6.6.2.2 Having conceded that Vimtsire Security was appointed through single sourcing or a confinement procurement process, PRASA submitted that the appointment of Vimtsire Security was done by way of the SCM Policy's urgency provisions. Several SCM records and agreements seeking to confirm Mr Montana's assertion that the appointment was an emergency, were provided.

6.6.2.3 It is again disturbing that the authenticity of the documents supplied cannot be verified as they are mostly undated and unsigned with one crucial document, an adjudication report being incomplete.

6.6.2.4 An undated notice to Tenderers, with tender number 525/2010/GAU/PS, contains the following:

*"TENDERERS ARE INVITED TO TENDER FOR THE PROVISION OF VARIOUS SECURITY SERVICES FOR A PERIOD OF SIX MONTHS"*

6.6.2.5 To support the view made earlier regarding the unreliability of documents supplied by PRASA, minutes of a meeting purportedly held **on 19 March 2010** appear to have been approved by Mr Stephen Nkhuna, Protection Services on **05 March 2010**, Mr Joe Buthelezi Acting Supply Chain Manager on **05 March 2010**, Ms Jackie Moshe RTPC Chairperson and Ms Nozipho Sangweni Regional Manager Gauteng. Regional on **08 March 2010**.

6.6.2.6 The minutes meeting reported as having been held on 19 February 2010, provide the following:

Table: Provision of security services at Gauteng region

File Reference:	Tender No. 525/2010/GAU/PS
Matter before the committee for	Consideration
Nature of matter before the Committee	New Business
Value of matter before the committee	R170,000,000.00 (VAT INCLUDED)
Value to BEE (BEE% value)	LEVEL 4
Budget Allocation	R170 000,000.00
Contract period	6 Months period

6.6.2.7 The comment on the document stated that the procurement department is requesting for the project to be approved as it is more than R500, 000.00.

6.6.2.8 The minutes state that the advertised date was 17 February 2010, Closing Date: 26 February 2010 and option date 08 March 2010.

6.6.2.9 The documents submitted by PRASA include an undated and incomplete submission for adjudication document for tender number 525/2010/GAU/PS. The following is stated on the document:

*"Scope of work*

*Appointment of contractors for the security services within the Gauteng region.*

*Background/motivation*

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*Metrorail is currently experiencing high incidents of security related risk. Cables, property damage to company's assets and fare evasion are very high. The current security arrangement is unfortunately unable to address these concerns.*

*Contracts for security do exist but these contracts have long expired. At the moment the arrangement has been a month on month type of an agreement. Head Office has promised to advertise a national tender; this tender is still not advertised.*

*It was therefore critical that an immediate action is taken to address all concerns mentioned above, to ensure safeguard Metrorail interest. It was also difficult to go out on tender because of the short period available to address this problem. **The close Tender method was used to ensure that deadlines are met.***

*The end user felt that the current postings of guard is creating problems as there is no proper demarcation and therefore supervision was lacking. Metrorail, as an interested part, was not receiving benefit with the current arrangement and therefore a new thinking was needed to alleviate these problems. It was decided by the end-user that allocation will henceforth be done per segment. This meant that each segment was going to be manned by one company as opposed to the previous arrangement.*

*Contract/Delivery period*

*The initial period of the contract is six (6) months based on the waiting period for the new national tender contract." (own emphasis)*

Table: Processes followed

Date of invitation	17 February 2010
Method of invitation	Letters were sent and confirmation was done telephonically
Briefing session	19 <sup>th</sup> February 2010 at 10 am at Metrorail Station Building Gauteng North
Closing date & time	26 <sup>th</sup> February 2010 @ 10h00
Closing Venue	Tender Box-Metrorail Station Building, Gauteng North
Number of documents issued	13
Number of documents received	12
How Proposals received	In sealed envelopes on the Tender Box
Validity expiry date of offer	08 March 2010

#### 6.6.2.10 Discussion and Proposal Evaluation

*The evaluation of the tender was based on:*

- a) *Capacity- Confirmation that the company has immediate available resources*
- b) *Price*
- c) *Compliance*

*The criteria in terms of price evaluation were done as follows:*

- *Award at the lowest quoted price if price is lower than R7000 per guard excluding vat*
- *If price is higher than R7000, bring price down to R7000 excluding vat*

TENDERED PRICES BY BIDDERS

Supplier	Unarmed Grade D Excluding vat	Armed Grade D Excluding vat	Horse Excluding vat
Changing Tide	7 198.00	8 168.00	No quote
Vimtsire Security Services	7 900.00	8 076.20	8 076.20
Futuris Security	6 735.00	7 135.00	3 800.00
Hlanganani Security	7 058.00	7 058.00	4 784.00
Manuel Security	11 306.68	12 437.34	186.60
Vusa Isizwe	7 800.00	7 800.00	6 950.00
Sinqobile Security	7 117.00	7 284.00	4 200.00
Royal Security	8 073.00	8 576.20	10 000.00
Enlightened Security	5 702.00	No quote	No quote
Ulwazi Security	9 150.00	9 150.00	No quote
Afriguard Security	7 160.00	7 250.00	4 000.00
G4S Security	No quote	No quote	No quote

6.6.2.11 The following companies were indicated as not taking part in further evaluation as they did not comply:

- G4S Security- did no quote
- Manuel Security-quote very high
- Ulwazi Security- quote high

6.6.2.12 Table: Detail of funding for project

No	Description	INCLUDING VAT
A)	Approved Budget for purchases	R170 000 000.00
B)	Source of funding operational	R170 000 000.00
C)	Expected Expenditure	Year 1: R670 000 000.00
		Year 2: N/A
		Year 3: N/A

Gauteng South

Table: Tender awards

Company	Segments	Number of Guards Unarmed Grade D	Cost per Guard	Total per month	Cost for Six Month
Vusi Sizwe	Soweto & Vaal	271	7980	2,162,580.00	12,975,480.00
Sinqobile	Brakpan	118	7980	941,640.00	5,649,840.00
Vimtsire Security Services	Krugersdorp	96	7980	766,080.00	4,596,480.00
Royal	Johannesburg	130	7980	1,037,400.00	6,224,400.00
Changing Tides	Kaalfontein	146	7980	1,165,080.00	6,990,480.00
Total				6,072,780.00	36,436,680.00

6.6.2.13 The following recommendations were further stated on the submission:

*"Recommendation*

*Regional Tender and Procurement Committee is requested to approve award business for the following companies:*

*Cables and Patrol*

- 1 *Afriguard –Guarding North, South and North areas for an amount of R640 224 including vat per month.*
- 2 *Hlanganani-Gauteng South, West region for an amount of R1 359 788 per month including vat per month.*

- 
- 3 *Futuris-Gauteng South, East region for an amount of R1 771 594.20 including vat per month.*

*Station, Yards and Depots*

- 1 *Vusi Sizwe- Soweto and Vaal for an amount of R2 162 580 including vat per month.*
- 2 *Sinqobile- Brakpan for an amount of R941 640 including per month*
- 3 *Vimtsire Security Services-Krugersdorp for an amount of R766 080 including vat per month.*
- 4 *Royal –Johannesburg for an amount of R1 037 400 including vat per month.*
- 5 *Changing Tides Kaalfontein for an amount of R1 165 080 including vat per month.*
- 6 *Enlightened Gauteng North Area North for an amount of R2 071 290.00 including vat per month.*
- 7 *R 1-Gauteng North Area South for an amount of R1 755 075.60 including vat per month.”*

6.6.2.14 I have noted that despite the fact that the Background/motivation in the undated and unsigned submission for adjudication document for Tender Number 525/2010/GAU/PP indicated that “The close Tender method was used to ensure that deadlines are met”, in her response to the notice I issued in terms of section 7(9) of the Public Protector Act, Ms Nozipho Sangweni contended that my preliminary finding to that effect is incorrect and insisted that the appointment of Vimtsire Security Services followed the request for quotation bidding method following the fact that it was below R350 million and emergency purchases for security reasons in line with PRASA SCM Policy.

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- 6.6.2.15 The evidence of documents obtained from PRASA revealed that a contract was entered into between PRASA and Vimtsire Security Services, signed by the contractor on 23 February 2010. The contract was for the provision of security personnel, equipment and horses to perform work at various Metrorail stations, yards, depots and sites in the Gauteng Metrorail region.
- 6.6.2.16 Another copy of the contract between PRASA and Vimtsire Security Services was also examined. The contract was signed by the contractor on 29 May 2010. The contract was for the provision of security personnel, equipment and horses to perform work at various Metrorail stations, yards, depots and sites in the Gauteng Metrorail region. The initial contract period was reflected as a period of 6 (six months) commencing on 13 March 2010 and ending on 13 August 2010.
- 6.6.2.17 The documents further revealed a notice to proceed to Vimtsire Security Services (attention Mr Phalatse) from Mr Joe Buthelezi, Acting SCM Manager, dated 03 March 2010, for project 525/2010/GAU/PS: provision of security services for a period of six months in the, protection services department, Metrorail Gauteng North. The notice to proceed stated that "Your quotation dated 25 February 2010 has been approved. This is a six month contract to a maximum amount of R4, 596,480.00 (Four Million Five Hundred and Ninety Six Thousand Four Hundred and Eighty Rand Only) including VAT.

*Stations, Yards and Depots*

Table: Gauteng South

Company	Segments	Number of Guards Unarmed	Cost per Guard	Total per month	Cost For six Month
Vimtsire Security Services	Krugersdorp	96	7,980.000	766,080.00	4,596,480.00
Total Including (Vat)					4,596,480.00

6.6.2.18 The above mentioned notice was signed by Mr Joe Buthelezi, Acting SCM Manager, on behalf of PRASA on 08 March 2010 and was accepted by Godfrey on 08 March 2010 on behalf of Vimtsire Security Services.

6.6.2.19 Another notice to dated 03 March 2010 is a letter addressed to Vimtsire Security Services from Mr Joe Buthelezi Acting Supply Chain Manager stating:

6.6.2.20 *"Your quotation dated 25 February 2010 against has been approved. This is a six month contract to a maximum amount of R7 537,680.00 (Seven Million Five Hundred and Thirty Seven Thousand Six Hundred and Eighty Rand Only) including VAT.*

Table: Gauteng South

Company	Segments	Type	Number	Cost	Total per month ( R )	Cost For six Month (R)
Vitmtsire	Krugers dorp					
		Unarmed	76	7,980.00	606,480.00	3,638,880.00
		Armed	76	8,550.00	649,800.00	3,898,800.00
Total					1,256,280.00	7,537,680.00

6.6.2.21 The notice to proceed letter as mentioned above on the table, was signed by Mr Joe Buthelezi Acting Supply Chain Manager on 08 March 2010 on behalf of PRASA and accepted by Mr Emanuel Dube on 08 March 2010 on behalf of Vimtsire Security Services.

6.6.2.22 The documents included a submission to extend contract validity period for payment purpose dated 12 March 2013. The aim of the submission was to request the Gauteng Provincial Manager’s approval to settle Security Services Provinces’ invoices for month of March 2013. However, there was also a hand written note saying that “ *NOT TO BE PAID REFER ATTACHED*”

6.6.2.23 A n extension letter dated 13 May 2013 from Mr Kabelo Mantsane Head of Corporate Security to Mr Godfrey Nmutandani of Vimtsire Security Services is also part of the documents. It was approved by the Head Group Corporate Security on 13 May 2013 and accepted by a representative from Vimtsire Security Services

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on 16 May 2013. Subject on the letter was extension of security contract with new terms and conditions Metrorail Gauteng Effective 01 May 2013 to 30 April 2014.

6.6.2.24 The following was stated on the letter:

*"We are pleased to advice that approval has been granted to extend your contract with minor changes to render security services to PRASA Rail within the Gauteng at the total contract value of R15, 308,494.56 (Fifteen Million, Three Hundred and Eight Thousand, Four Hundred and Ninety Four Rand and Fifty Six Cent) with a total security contingent of 138 Grade D security officers. The unit cost for security is as follows:*

- |      |                    |                            |
|------|--------------------|----------------------------|
| 1.1. | 69 Grade D Unarmed | @ R7, 950.00 excluding vat |
| 1.2. | 69 Grade D Armed   | @ R8, 268.00 excluding vat |

*Addendum document with additional penalty items are on page two (2) for acceptance/rejection.*

*Addendum to the Contract Document:*

*The current contract signed between your company and PRASA excluded the following penalty provision that needs to be included for the effective management of the Security Service Provision Contracts at an operational level."*

Table: penalty provision

Item Description	Penalty Amount
<i>Uniform</i>	<i>R500</i>
<i>Hand Cuffs or Handcuffs Keys</i>	<i>R75</i>
<i>Baton</i>	<i>R75</i>
<i>Whistle</i>	<i>R75</i>
<i>COC( Certificate of Competency)or Firearm or Ammunition</i>	<i>R350</i>

- 6.6.2.25 Regarding the allegation that Vimtsire Security Services was awarded a contract where after it requested PRASA to improperly grant them an indemnity against contractual penalties, my investigation team and I noted an application from Vimtsire Security Services dated 14 February 2011 in that regard.
- 6.6.2.26 It should be noted that copies of subsequent contract(s) entered into between PRASA and Vimtsire Security Services upon the expiry of the contract signed on 29 May 2010, were not provided. An inference that can be drawn is that if the contract signed on 29 May 2010 sought to extend the contract signed on 23 February 2010, whose duration was from 13 March 2010 to 13 August 2010 for another six (6) months, then the contract signed on 29 May 2010 would have expired on 13 February 2011.
- 6.6.2.27 In her response to the notice I issued in terms of section 7(9) of the Public Protector Act regarding the issue, Ms Nozipho Sangweni submitted that the evidence of the letter of extension dated 13 May 2013 suggests that Vimtsire Security Services were operating with an indemnity against penalties. The fact that Vimtsire Security Services applied for indemnity from penalties gives credence to the allegation that it was appointed without meeting the minimum requirements.

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- 6.6.2.28 The Complainant alleged that there were procedural defects and discrepancies within tender no 525/2010/GAU/PS and that no action was taken against the Manager concerned for acquiring additional 241 guards without following SCM Policy.
- 6.6.2.29 An unsigned letter from Mr RM Khumalo: Acting Regional Security Manager addressed to Ms N Sangweni Regional Manager dated 20 July 2010 was provided by the Complainant. Although the authenticity of the letter is doubtful, its contents include the following:

*"Procedural Defects/ Discrepancy within Tender No. 525/2010/GAU/PS*

*Background*

*Protection Services presented a Development Plan to the Gauteng Regional Manager that indicated the guard compliment of 1701. The deployment plan was then used as a base to procure contracted security services.*

*Development*

*On 08 March 2010 the Tender Committee approved the provision of security service at Gauteng Region. The approved provision of the security services was specific to individual security contractors listed below with regard to guards' strength/ compliments and value up to period of six (6) months.*

*Tender Award*

*The below service providers were awarded the tender as summarised."*

Table: Tender award

<i>Company</i>	<i>Guards Approval as per Tender Committee 03 March 2010</i>	<i>Additional Guards Outside Tender Committee Approval after 10 March 2010</i>	<i>Totals</i>	<i>Service Provider invoice</i>	<i>Comments</i>
<i>Vusa Isizwe</i>	<i>271</i>	<i>38</i>	<i>309</i>	<i>309</i>	<i>38 guards not approved through tender (sic) process/committee</i>
<i>Hlanganani</i>	<i>142</i>	<i>0</i>	<i>142</i>	<i>142</i>	<i>Approved By Tender Committee</i>
<i>Vimtsire Security Services</i>	<i>96</i>	<i>56</i>	<i>152</i>	<i>152</i>	<i>56 guards not approved by the Tender Committee</i>
<i>Royal</i>	<i>130</i>	<i>124</i>	<i>254</i>	<i>254</i>	<i>124 Guards not approved by the Tender Committee</i>
<i>Futuris</i>	<i>201</i>	<i>0</i>	<i>201</i>	<i>203</i>	<i>2 Guards not approved by Tender Committee</i>
<i>Sinqobile</i>	<i>118</i>	<i>0</i>	<i>118</i>	<i>118</i>	<i>Approved by</i>

					<i>Tender Committee</i>
<i>Changing Tides</i>	146	21	167	167	<i>21 guards not approved by the Tender Committee</i>
<i>R1</i>	270	0	270	270	<i>Approved by Tender Committee</i>
<i>Afri-Guard</i>	52	0	52	52	<i>Approved by Tender Committee</i>
<i>Enlightened Security</i>	282	0	282	282	<i>Approved by Tender Committee</i>

*The initial tender security complements is for 1701 guards, yet the current security compliment is 1947.*

*The discrepancy in the contract figures versus the deployment figures is as a result of the additional request made by the Protection Services after the Tender Committee approved the original request. This therefore means that 241 security guards plus 2 security guards that Futuris Guarding is invoicing were never approved by the Regional Tender Committee.*

*The additional request of the 241 security guards was made by Mr D Xelelo on behalf of Mr S Nkhuna on the 10 March 2010 through an e-mail to Ms Y Moetsela and Mr Buthelezi both of Supply Chain. It is upon this correspondence that additional guards were acquired and award letters amended.*

*Protection Services is now aware that Royal, Vusa-Isizwe, Changing Tides and Vimtsire Security Services received two (2) letters, the first one as per the Tender Committee approval and the second one as per the e-mail correspondence. Further to*

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*the award letters, there was additional approval through e-mail of firearms and hand radios which were never part of the Tender Committee approval.*

*The contract value as per the Tender Committee approval per month and for a period of for six (6) months is R13, 670,751.00 million and R82, 024,506 million respectively.*

*The contract value was then changed by the additional request to R15, 862,401 million per month and R95, 174, 406 million for a period of six (6) months. This process was never formally brought to the tender Committee for approval. In light of the above process irregularities the Security Contract Budget was then affected causing a monthly and a period of six (6) month variance of R2, 191,650 million and R13,149,900 million respectively.*

#### *Invoices*

*The contracted Security Services Providers invoices are currently based on the award letters which includes the guard compliments 241 to the value of R2, 191,650 million not approved by the Tender Committee."*

- 6.6.2.30 In her response to the notice I issued in terms of section 7(9) of the Public Protector Act regarding the issue, Ms Nozipho Sangweni admitted that the Acting Supply Chain Manager did not follow the PRASA SCM Policy in acquiring additional 241 guards but denied that no action was taken against the manager concerned. Ms Sangweni submitted that she raised the issue of discipline with the manager in charge of the department as well as the head of security at PRASA Head Office at the time, given that she did not have authority over the security department since it was reporting directly to Mr Mantsane, Head of Security at PRASA Head Office.

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- 6.6.2.31 In support of her contention, she submitted a copy of a memorandum addressed to Mr Mantsane dated 28 July 2010 in which she proposed that the additional unauthorised numbers of security guards be cut with immediate effect. She also proposed therein that necessary corrective action against individuals who transgressed the SCM Policy be addressed. She further indicated that the irregularity was costing the region about R2 million per month which resulted in over-expenditure.
- 6.6.2.32 From the evidence provided, no corrective action was taken by Mr Mantsane on individuals who transgressed the SCM Policy, as had been proposed by Ms Sangweni. There is also no evidence showing that the unauthorised guards were removed.

**6.7 Complaint 7: Regarding the alleged irregular payment of Royal Security invoice for security services:**

6.7.1 Common cause

6.7.1.1 It is common cause that Royal Security was appointed by Mr Montana as GCEO on tender 525/2010/GAU/PS for the provision of security services for a period of six months in the protection services department of Metrorail Gauteng North and paid for its services.

6.7.2 Issues in dispute

6.7.1.2 The matter for my determination was whether or not an irregular payment of R300 000.00 was made by PRASA bringing the amount paid to Royal Security to R2.8 million instead of the contract price of R2.5 million.

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6.7.1.3 In his response to the notice I issued in terms of section 7(9) of the Public Protector Act, Mr Montana denied that PRASA had irregularly paid an amount of R2.8 million to Royal Security as alleged. PRASA admitted that an invoice of R2.8 million was received from Royal Security but management discovered what appeared to be an error on Royal Security's invoice. He advised that the error was brought to the attention of Royal Security and a correct invoice of R2.5 million was later issued and submitted to PRASA the following month.

6.7.1.4 The Remittance Advice dated 28 February 2011 corroborates Mr Montana's submission that Royal Security was paid an amount of R2.5 million and not R2.8 million.

**6.8 Complaint 8: Regarding PRASA's alleged irregular payment of R600 000.00 made in advance to Enlightened Security:**

6.8.1 Common cause

6.8.1.1 It is common cause that Enlightened Security was awarded a contract of a duration of six months valued at R681 720.00 per month by PRASA and was periodically paid for work done.

6.8.1.2 The fact that Enlightened Security was contracted and paid was not disputed.

6.8.2 Issues in dispute

6.8.2.1 The key matter for my determination was whether or not PRASA made an advance payment before the contract was signed and service rendered.

- 6.8.2.2 In its submissions, including a submission made I response to a notice issued in terms of section 7(9) of the Public Protector Act, PRASA has maintained that it never paid an advance payment to Enlightened Security.
- 6.8.2.3 However, the documents submitted by PRASA which include a payment schedule, 'notice to proceed' and memoranda, tell a different story. The evidence in the form of a copy a copy of a "notice to proceed" shows that whereas letter authorising commencement of work issued on 17 October 2008, the first payment was made on 22 October 2008.
- 6.8.2.4 I am, accordingly satisfied that there is credible evidence proving that an advance payment of R681 720.00 was made to Enlightened Security as alleged. It also appears that the payment was not factored in the payment schedule, with the possibility that there may have been a double payment.
- 6.8.2.5 On perusal of the documents received from the Complainant we noted there was a statement dated 05 May 2009 from Enlightened Security force. The credit note reflected the following:

*Table: credit note details*

NO	Date	Invoice	Company	AMOUNT
1.	19/09/2008	2008-743	Mabopane Station	684 720.00
	22/10/2008	2008-743	Payment Thank you	(681 720.00)
2.	01/10/2008	2008-808	Mabopane Station	681 720.00
	03/11/2008	2008	Credit Note	(5 719.84)
	22/11/2008	0845	Payment Thank You	(676 000.16)
		2008-808		

3.	01/11/2008	2008-864	Mabopane Station	681 720.00
	01/12/2008	2008	Credit Note	(4 636.61)
	04/12/2008	0462	Payment Thank You	(672 446.78)
	20/01/2009	2008-864	Underpayment	4 636.61
	02/02/2009	2009-61 2009-61	Payment Thank You	(4 636.61)
4.	01/12/2008	2008-970	Mabopane Station	681 720.00
	16/01/2009	2008-970	Payment Thank You	(681 720.00)
5.	01/01/2009	2009-57	Mabopane Station	681 720.00
	03/02/2009	2009	Credit Note	(513)
	26/02/2009	0002 2009-57	Payment Thank You	(681 207.00)
6.	01/02/2009	2009-112	Mabopane Station	681 720.00
	06/03/2009	2009	Credit Note	(627.00)
	20/03/2009	0018 2009-112	Payment Thank you	(681 093.00)
7.	09/03/2009	2009-194	Mabopane Station	681 720.00
	06/04/2009	2009-	Credit Note	(2 348.40)
	21/04/2009	0037 2009-194	Payment Thank You	(679 371.60)

6.8.2.6 It is noted that in both instances the invoices were issued before the notice to proceed was issued on 17 October 2008. In essence in both instances payment was solicited prior to appointment. This state of affairs gives credence to the allegation that payment was processed prior to appointment. It raises questions as to why PRASA would have accepted the invoices when in fact the appointment had not been made.

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6.8.2.7 I am accordingly satisfied that there is credible evidence that an advance payment of R681 720.00 was made to Enlightened Security as alleged. It also appears that the payment was not factored in the payment schedule, with the possibility that there may have a double payment.

**6.9 Complaint 9: Regarding the alleged improper appointment of a service provider for *Hambanathi Magazine*:**

6.9.1 Common cause

6.9.1.1 It is common cause that Mr Montana awarded a three year contract in 2012 to KG Media for the production and distribution of its corporate newsletter *Kwela Express* formerly known as *Hambanathi*, valued at R16 764 111.00 based on monthly payment of R465 669.75.

6.9.1.2 It is also common cause that *Hambanathi* was created and originally published by Metrorail, a subsidiary of PRASA as an inhouse magazine but Metrorail had not patented it. It is also common cause that Mr Pule Mabe, who now owns *Hambanathi* and has renamed it *Kwela Express* used to be a Metrorail employee involved in the production and distribution of *Hambanathi* until he left PRASA in 2008.

6.9.1.3 It is also common cause that the contract was not preceded by an open tender or other competitive bidding process such as obtaining three quotations as prescribed in its SCM Policy. In this regard the service provider was treated as a single source appointed on "confinement".

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6.9.2 Issues in dispute

6.9.2.1 The matter for my determination was whether or not the conditions for permissible single sourcing existed thus allowing PRASA to deviate from an open bidding process.

6.9.2.2 Mr Montana has maintained that Kwela Express is owned privately and the only basis it could take advantage of it as a platform for communicating various aspects of its operations to its stakeholders was through a direct partnership without a competitive bidding process. It is interesting that Mr Montana did not indicate that actually Kwela Express belonged to PRASA and Mr Mabe was only able to appropriate it because he registered a patent on it after leaving PRASA's employment.

6.9.2.3 A perusal of the agreement between the parties reveals the following:

*"Agreement*

- a. *PRASA hereby agrees to review and renew a working relationship/ partnership with the service provider who also hereby agrees thereto, for the provision of the Executive National Commuter Newspaper- Kwela Xpress, and related CSI services limited to Field Activation and the Introduction of additional ticket distribution channels subject to the provisions of this agreement. This agreement shall be subject to a regular review, if necessary, by PRASA.*
- b. *This agreement shall, notwithstanding the date of signature, commence on 01st April 2012 (herein referred to as the Effective Date) and shall continue for*

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*a period of 3 years (36) months until 01st April 2015. The contract shall be reviewed at the end of this period.*

- i. For avoidance of doubt the mobile ticket distribution platform shall become an on-going service for PRASA and its customers beyond the initial contract duration as per clause 3.2 with annual reviews unless terminated earlier as provided for in this contract.*
- ii. The parties may consider entering into a separate and elaborate working agreement to regulate the mobile ticket distribution platforms.*

#### *Pricing Structure and payment*

*In consideration for the performance of the services as agreed to PRASA shall pay to the Services Provider the agreed contract price of R465 669.75 per month with an annual inflationary review. All invoices will be processed in accordance with services rendered as per clause 6.2 on the duties of the service provider. The following cost formula will apply in executing such payments:*

- 5 Pages worth of exposure every month, including advertorial, photography and advertisement divided bi-weekly, with a total of 2 ½ pages per edition calculated in accordance with Kwela Xpress rate-card as follows:*
- 5 full page's (39 cm x 7 columns x265 x5= R361 725)*
- Visual Communications including web insertions and interactive cartoons with a total of six insertions biweekly calculated as follows:*

- 
- 12 insertions compatible for web and mobile broadcast ( 1 insertion=  
R12 500x12= R150 000)
  - Overall Total per moth calculated as follows: (R361 725 + R150 000=  
R511 725 (excl Vat) Discount, at 9% of the total value (R46 055.25)
  - Total Monthly Contract Amount R 465 669.75 excluding Vat.”

6.9.2.4 The evidence appears to be consistent with an unsolicited bid scenario but I will later deal with the legal requirements of an unsolicited bid and whether or not the manner in which the procurement of the Kwela Express partnership complied therewith.

6.9.2.5 What must be noted is that no evidence was provided by PRASA indicating that the market was tested and no other service provider could provide the same or similar service as Kwela Express could be found. It would also appear that no independent process was undertaken to test the cost effectiveness of the Kwela Express pricing.

## **6.10 Complaint 10: Regarding the alleged irregular appointment of Mr Ezra Ndwandwe’s Consultancy in 2008/9 period:**

### **6.10.1 Common cause**

6.10.1.1 It is common cause that PRASA appointed Mr Ezra Ndwandwe as a change management consultant without an open competitive bidding process.

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6.10.2 Issues in dispute

- 6.10.2.1 The matter for my determination was whether or not PRASA's deviation from competitive bidding was justified in the circumstances and the process followed was as authorised by the SCM Policy.
- 6.10.2.2 In its response received on 29 August 2013, PRASA submitted that an entity owned and managed by Mr Ndwandwe, namely Ndwandwe Consultancy was appointed without an open tender or three quotations.
- 6.10.2.3 PRASA further submitted that the appointment was a confinement appointment in terms of its SCM Policy initiated by its Group HR Division, but required the approval of its GCEO in accordance with its SCM Policy.
- 6.10.2.4 Worth noting is a memorandum submitted by PRASA regarding the motivation of confinement for Ndwandwe Consultancy shows that it was engaged to execute a value creation and culture change project after an excursion he facilitated for PRASA management. The document dated 25 June 2008 from Miss Liz Choonara addressed to GCEO, was prepared under the authority of Mr Johannes Mamabolo, recommended by Group Executive HR and approved by the GCEO. The following was said in the motivation.

*"Background*

*Following the **executive excursion held in Parys on January 27 -29<sup>th</sup>, 2008 facilitated by Ndwandwe Consultancy** it was decided that SARCC would engage the services of Ndwandwe Consultancy (PTY) Ltd to assist the organization in its quest **to forge a new vibrant performance and value driven culture.***

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*Facilitation Skills of Ndwandwe Consultancy*

*Ndwandwe Consultancy through its founder and MD Ezra Ndwandwe have done work with SARCC from when he was invited to talk to the top 300 managers on transformation and the challenges that it poses to management today. Following that engagement Ndwandwe has been requested time and again to assist with what would be burning management/ leadership challenges in the organization- to assist in either Finding solutions or to advise management on how to deal with them. To that effect, Ndwandwe has successfully done work for the Wits, Eastern Cape, Cape Town and Head Office. It is against this background that we think Ndwandwe understands our business thoroughly.*

*Exposure to SARCC*

*Given the urgency of the culture change within SARCC at the back of the merger of the different entities, it was decided that Ndwandwe's intervention could not have come at a better time than now.*

*Notwithstanding our procurement and tendering procedures, given that*

- *the consultancy has sufficient knowledge and skills on the subject of organisational culture change and have been exposed to SARCC through the facilitation of: Top 300 Executive Lekgotla in January 2008, RBO'S in Cape Town Region, Executive Excursion in April 2008.*
- *the consultancy understands our business model and the strategy of where are we going, the history of consulting and the clients it has on its books ( which clients are known to be very strict in selecting organizational advisors, particularly African based),*
- *management's commitment to the PRASA Board to change the culture of this organization within two years,*

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- *the fact our organization needs to begin to position itself as the employer of choice, we would like to motivate for the appointment of Ndwandwe Consultancy for the period of Eighteen Months (18 Months) to assist the organization with the culture change project.*

#### *Scope of Agreement*

*SARCC seeks the services of Ndwandwe Consultancy for management and leadership development to assist in culture change in the following areas:*

- *developing change managements tools,*
- *developing and implementing the transformation agenda of the SARCC, in order to change or align the organizational and individual behaviours to support the new strategy and business model.*

*Ndwandwe Consultancy will render services across the HR spectrum but confined to people specific change and transformation as may be required at strategic level from time to time.*

*SARCC would like to appoint Ndwandwe Consultancy as Principal Leadership Development and Management Consulting with regards to Human Capital*

#### *Development.*

*Ndwandwe Consultancy (Pty) will assist SARCC by delivering the necessary interventions through its consultants i.e. to develop change processes, tools, training, facilitation or specific interventions geared at resolving identified problems or barriers to change. Ndwandwe will also act as an advisor to SARCC on what interventions would be needed and quality check such intervention (s) where applicable or necessary.*

*Administration of Agreement:*

*It is the view of both parties that the effectiveness of this agreement in terms of its intentions and mandate needs to be appraised quarterly i.e. it is agreed that both parties and related stakeholders would appraise the effectiveness of this relationship by way of discussion, pointing out where there might be bottlenecks, gaps, corrective measures and/or areas of improvement and benchmark areas.*

*It remains optional for SARCC to use the services of Ndwandwe as their business requires NB: These costs exclude material development and associated printing costs.*

Table: Costing

<i>1 X Full time resource and 1X part time resources from Ndwandwe</i>						
	<i>Managing Consultant number of hrs.</i>	<i>Account Executive</i>	<i>Number Of days/month</i>	<i>Cost per month</i>	<i>Number of months</i>	<i>Cost for the 18 months duration</i>
<i>Part Time Resource MD rate= R2400/hr.</i>	8		8	153 600	18	2,764,800.00
<i>Full Time Resource AE rate= R1 500/hr.</i>		8	16	192 000	18	3,456,000.00
					<i>Total</i>	6,220,800.00

*Proposed Payment Method*

*The payments will be structured as follows:*

***R345 600.00 per month*** based on the number of hours worked for both Managing Consultant and Account Executive as reflected on the table above. The payment will be based on monthly report and invoices supplied. No delivery, No payment.”

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- 6.10.2.5 It was further noted on the motivation of confinement document, that there was a handwritten note and it read as *"Liz, Approval is granted, subject to confirmation that supply chain has been involved in this process. It is important that when confinement is chosen as the preferred route provision of SCM policy are adhered to."*
- 6.10.2.6 An undated recommendation report addressed to the GCEO from the Chief Procurement Officer for tender number HO/HR/05/200/PR2248 was also approved by Mr Montana as the GCEO on 16 July 2008. It confirms the scope as being leadership and change management support to facilitate the integration of 5 previously independent entities that then constituted PRASA.
- 6.10.2.7 From the evidence it is clear that Mr Ndwandwe's consultancy's appointment was triggered by an existing relationship, which had included an excursion that took place immediately before the impugned contract was initiated. It is also clear that no process was followed to establish if any other agency offered similar services. More importantly, no demand management exercise preceded the engagement. Unfortunately, the investigation did not examine what the excursion mentioned in the procurement memo was for, whether or not PRASA paid for it and how Mr Ndwandwe's consultancy had been procured it as the impugned engagement apparently flows from that excursion.

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## 6.11 Complaint 11: Regarding the alleged irregular awarding of CCTV cameras tender to Mr. Vusi Twala, a then Board Member

### 6.11.1 Common Cause

6.11.1.1 It is common cause that Mr Vusi Twala had an interest in the CCTV cameras tender.

### 6.11.2 Issues in Dispute

6.11.2.1 The matter for my determination, on the evidence, was whether or not Mr Vusi Twala, a Board Member at the time, had an undisclosed interest in the company awarded the tender and if he and the Board failed to manage a consequent conflict of interest arising from him having to look after his financial interests in the said company while honouring his fiduciary duties to tax payers as a Board member of PRASA.

6.11.2.2 Despite evidence to the contrary, Mr Montana, in his response received on 29 August 2013, submitted that at no stage did PRASA issue a tender for the provision of CCTV cameras to Mr Vusi Twala. In his response to the notice I issued in terms of section 7(9) of the Public Protector Act, Mr Montana also reiterated that Intersite has never at any stage whatsoever awarded a contract for the installation of CCTV cameras to Mr Vusi Twala.

6.11.2.3 While Mr Montana denied that Mr Vusi Twala had an interest in the CCTV cameras tender, one of the documents provided with his submission, is a copy of PRASA Board Minutes of a meeting held on 1 December 2008 reflecting Mr Vusi Twala's disclosure of interest in the CCTV cameras tender. Notably, the minutes in

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question include a recording that the PRASA Board has accepted that Mr Vusi Twala has fully declared his interest with regard to the CCTV cameras tender. There is also a contract questionnaire form completed by Mr Vusi Twala, declaring that he is a Director at several companies and a member in two (2) close corporations.

6.11.2.4 PRASA failed to provide the necessary tender documents relating to this issue.

6.11.2.5 While, the only logical conclusion I could make on the scanty evidence before me, was that Mr Vusi Twala indeed had some interest in the CCTV cameras tender, I could not make a determination regarding the nature of such interest and whether or not the alleged conflict of interest had been managed as prescribed in the SCM Policy.

**6.12 Complaint 12: Regarding PRASA's alleged improper increase of the scope and value of marketing and communications tender number HO/M&C/305/07/2009 awarded to Brand Leadership for R29 million:**

6.12.1 Common cause

6.12.1.1 It is common cause that Brand Leadership was awarded the PRASA branding contract as per tender number HO/M&C/305/07/2009, for an initial total value of R12 921 456.00 and that subsequently the total contract price of R29 528 000.00 included a substantial scope and price variation, from what had been advertised.

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6.12.2 Issues in dispute

6.12.2.1 The matter for my determination was whether or not the circumstances for the scope variation were in line with those authorised in the SCM Policy.

6.12.2.2 PRASA in its response received on 29 August 2013, and subsequent response to the notice I issued in terms of section 7(9) of the Public Protector Act, acknowledged that the original project scope was 12 months valued at R12 921 456.00 and that both scope and price were expanded to 18 months for a total amount of R29 528 000.00, respectively. It maintained that the scope and price variation were reasonable and justified in the circumstances and permissible in terms of the SCM Policy. PRASA submitted the following:

- a) *This was an open and competitive tender advertised in newspapers with an estimated value of R30 million, with many companies participating in the tender.*
- b) *The RFP was advertised on 2 August 2009 in various newspapers and closed on 3 September 2009.*
- c) *Ten bids were received from, Media Inventions, Altimate Consultants, Brand Leadership, Black Vision, Cutting Edge, Gold Creative, Black Magic, Blue Flame, Sakaza Communications, The Communications Firm.*
- d) *Brand Leadership was awarded the tender through a fair and competitive process. The new PRASA Brand Identity was taken to the PRASA Board for approval.*

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- e) *The contract award amount was R29.5 million. There was a motivation to increase the contract value to R36.8m which was supported by the tender committee and subsequently approved by the GCEO in terms of a delegated authority...*
- f) *Based on the above, it is Management contention that due process was followed and that the award was beneficial to the company.*
- 6.12.2.3 A memorandum dated 16 July 2009 prepared by Mr Tiro Holele, GM: Corporate Affairs for the attention of the Mr Tshepo Lucky Montana, GCEO was signed by Mr Tiro Holele, Mr Zipho Mavimbela, Senior Manager, Marketing on 16 July 2009 and was approved by GCEO on the same day.
- 6.12.2.4 According to the standard contract completed by Brand Leadership in the tender documents, the duration of the contract is from 1 October 2009 to September 2010 and the contract value proposed by Brand Leadership was R12 921 456.00. The contract indicates that Brand Leadership was to provide professional Services in respect of Marketing and Communication services for the PRASA Group.
- 6.12.2.5 The CTPC approved the appointment at a cost of R12, 921 456.00 (VAT Included) following a recommendation made by Mr Zipho Mavimbela, and Ms Tara Ngubane, Chief Procurement Officer Paragraph 8 of the submission for adjudication report states the detail funding of the project as follows:
- a) *Approved budget purchase R9 528 000 (Including VAT);*
  - b) *Source of funding-Operational expenditure budget (2009-2011); and*
  - c) *Expected expenditure per annum-year 1, R9 528 000, year 2, R20 million (Including 2010 world cup activities), Year 3-To be announced*

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6.12.2.6 According to a CTPC resolution minutes dated 13 October 2009, the CTPC reconvened and Mr Tiro Holele, GM: Corporate Affairs presented the Submission for Adjudication by the Technical Evaluation Team. He explained to the members of the CTPC that everything related to the creative side, i.e. designs and planning will be done by the recommended service provider. He further indicated that what was proposed was an “*as and when*” contract in a capped amount of R9, 258, 000.00 inclusive of VAT. The following was resolved by the CTPC:

- *Both the creative side of acquisition of the equipment estimated at R20 million for the FIFA World Cup be centralised in the contract so that the total value of the contract be R29, 528, 000.00 inclusive of VAT;*
- *SCM negotiates a cost plus percentage for the acquisition of the required FIFA World Cup marketing equipment; and*
- *Marketing and Communication services tender be awarded to Brand Leadership in the amount of R29, 528, 000.00 inclusive of VAT for the period 1 November 2009 to 31 March 2010 and subject to the contract being capped at R29, 528, 000.00 inclusive of VAT and Approval by the GCEO.*

6.12.2.7 The records show that the Recommendation Report was signed and approved by the GCEO for the appointment of Brand Leadership for provision of Marketing and Communication services at an amount of R29, 528, 000.00 inclusive of VAT. On the same day of approval by the GCEO a tender advice was created in favour of Brand Leadership at the value of R29, 528, 000.00.

6.12.2.8 A contract between Brand Leadership and PRASA, was concluded and signed on 18 January 2010. This was the only contract noted after the letter to proceed was issued to Brand Leadership. The contract was signed two months after the

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appointment date. The duration of the contract was indicated as from 1 November 2009 to 30 November 2011.

- 6.12.2.9 I have noted that the contract between Brand Leadership and PRASA does not reflect the total contract cost, only rates are provided. This creates a potential of price escalations as the contract price is not capped.
- 6.12.2.10 It is disconcerting that PRASA accepted Brand Leadership's bid of R12 921 456.00 (VAT included) on tender number HO/M&C/305/07/2009 whereas the approved budget purchase in that regard was set at R9 528 000.00 (Including VAT). It is also disconcerting that despite the CTPC having resolved that the total value of the contract be capped in the amount of R29 528.000.00 for the period 1 November 2009 to 31 March 2010, the notice to proceed issued to Brand Leadership indicated that the period of the contract was from 1 November 2009 to 30 November 2011.
- 6.12.2.11 It is noted that no explanation was provided by PRASA for the discrepancy alluded to above. I am also not aware of any procurement process which sought to extend the contract beyond 31 March 2010 as resolved by the CTPC.
- 6.12.2.12 In the circumstances, there is substance in the allegation that the PRASA branding contract value escalated beyond the R9 million which was initially envisaged. The facts disclose a clear case of scope creep. The fact that PRASA accepted Brand Leadership's bid of R12 921 456.00 (VAT included) on tender number HO/M&C/305/07/2009 whereas the approved budget purchase in that regard was set at R9 528 000.00 (Including VAT) is proof of that. The fact that the contract between PRASA and Brand Leadership does not specify the actual contract amount also rendered it susceptible to uncontrolled scope escalation.

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6.12.2.13 Similarly, whether the contract was improperly extended beyond 31 March 2010 as already alluded to above is a legal matter which will also be resolved when measuring conduct against the rules in the following chapter.

**6.13 Complaint 13: Regarding the GCEO's alleged improper appointment of Mr Edwin Lekota on a tender amounting to R10 million for the development of a Contingency Emergency Preparedness Programme for Metrorail by PRASA:**

6.13.1 Common cause

6.13.1.1 It is common cause that Lekga Investment Holdings, represented by Mr Edwin Lekota, was awarded a tender for the development of a Contingency Emergency Preparedness Programme for Metrorail by PRASA in 2008.

6.13.2 Issues in dispute

6.13.2.1 In its response PRASA denied that the appointment was irregular and that an improper relationship existed. PRASA submitted that Mr Lekota, the former CEO of PRASA's predecessor SARCC, was appointed to its Board of Inquiry together with two rail technical experts i.e. Dr Chris Dutton and Dr Friedel Mulke due to his train operations expertise as former CEO of SARCC, subsequent to an incident in which six trains were burned in Pretoria. PRASA further submitted that the appointment of the Board of Inquiry was done in accordance with its operating licence obligations with the Rail Safety Regulator (RSR). PRASA also submitted that the team produced a report on the root causes and recommendations and also produced a business continuity management framework.

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- 6.13.2.2 PRASA also submitted that the total amount of that work following the review of Metrorail business continuity management processes and procedures in the respective Metrorail regions amounted to R4.5 million. It further submitted that it does not require a procurement process since it is an emergency when appointing any Board of Inquiry and denied that the tender was improperly awarded and disputed the alleged R10 million costs.
- 6.13.2.3 At this stage I need to emphasise that PRASA did not provide my office with the terms of references regarding the work of the Board of Inquiry appointed as contended and its report and recommendations in that regard. Surely the Board of Inquiry would have been confined to a specific lifespan with a clearly defined mandate and scope.
- 6.13.2.4 With regard to the appointment of Mr Lekota his engagement letter dated 1 March 2008 from Mr Enos Ngutshane, Operational and Safety Department, Head Office addressed to Mr Edwin Lekota defined the scope of the work to be done by Lekga Investment Holdings (Pty) Ltd (Lekga) as represented by Mr Edwin Lekota.
- 6.13.2.5 The engagement was in respect of implementation of management standards (ISO 9001: 2000) towards the integrated management (TMS). The scope of the work was to provide the overall review of railway safety management system, which constitutes the two phases.
- 6.13.2.6 The hourly charge out rates as set out in the engagement letter are captured in the table below:

Table: Lekga charge out rates

No.	Designation	Rate (R)
1.	Consultant	1 509
2.	Assistant	655
3.	Administrator	240
4.	Specialist	1509

Minutes of Cross Functional Sourcing Committee (CFSC): 25 August 2010

6.13.2.7 Unsigned minutes of the CFSC dated 25 August 2010 with resolution number HQ/PROC/CFSC 052/2010, which captures an extract from the resolutions from Sourcing committee minutes of 28 July 2010 also confirm the engagement and scope thereof. There appears to have been some discomfort expressed about the contract :

*“After the deliberation on the matter, CFSC expressed its discomfort that the following issues which were not clear enough or indicated in the submission to make an informed decision, need to be clarified and incorporated in a new submission to the committee.*

- a) **There should be no referral to previous contract-this is now a new appointment confined to the recommended service provider.**
- b) **Clear deliverables of the proposed contract is needed.**
- c) A breakdown schedule to the submission of:
  - i. **Exactly what work that is going to be done and how it is going to be done.**

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- ii. *The rates per hour compared to those in the market place*
  - iii. *The hours that will be worked(timelines)*
  - d) *Written confirmation from finance department of the amount of money available for the transaction*
  - e) *A detailed motivation why it is necessary to implement the management standards*
  - f) *Inclusion of the following supplier documents in the submission to the committee*
    - i. *Valid tax clearance certificate*
    - ii. *Proof of Bank Account*
    - iii. *BEE rating certificate; and*
    - iv. *An official company letterhead*

*CFSC noted the revised submission and after a long discussion of the matter and after comparing the current submission with the previous submission and the contract, could not see a difference in the work and therefore resolved that the following action be taken by the end-user:*

- a) *Submit a motivation to SCM department of the work already been done and the amount that is due to the Service Provider in order to submit the matter to the GCEO for condonation*
- b) *Submit a statement of all outstanding amounts to finance department for payment*
- c) *Terminate the contract by giving the Service provider notice as per clause 5 of the agreement*
- d) *Consult with PRASA Rail on the Benchmarking exercise currently in progress to determine whether there are not overlaps with the Management in terms of ISO 9001-2000*

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- e) **Compile a new specification and issue a tender for the new phase if still required taking into consideration the work already performed at the various Metrorail regions.** (my emphasis)

6.13.2.8 The evidence shows that Mr Lekota was appointed in respect of the implementation of management standards (ISO 9001: 2000) towards the integrated management (TMS). The GCEO's submission that Mr Lekota was appointed as part of the PRASA Board of Inquiry subsequent to the burning of six trains in Pretoria is misleading and clearly not supported by the evidence provided by him. I have also noted that the scope of the work to be done was to provide the overall review of railway safety management system and nowhere in the two phases outlined above does the scope include the investigation of the root causes of the incident regarding the burning of trains in Pretoria and making recommendations in that regard.

6.13.2.9 I have further noted that the minutes of the CFSC dated 25 August 2010 with resolution number HQ/PROC/CFSC 052/2010 (which ostensibly refers to a tender) indicates that *"the contract was signed for a specific deliverable at the time it was discussed with the GCEO"*. The minutes further reiterate that *"we were looking for the implementation of ISO9001 at the Corporate Office"*. This is contrary to the contention by PRASA that in the matter of safety and fatalities, the GCEO in his capacity as the ultimate official responsible for safety has a legal obligation in terms of the Rail Safety Regulator Act to establish a Board of Inquiry as promptly as possible and that the process does not require a tender to be issued.

6.13.2.10 Clearly the appointment of Mr Lekota as indicated above was not in pursuit of the establishment of a Board of Inquiry in relation to the burning of six trains in Pretoria as contended by PRASA. The conclusion that the contract was not for a Board of

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Inquiry is further corroborated by the minutes of the CFSC alluded to above. The minutes further show the CFSC expressed discomfort regarding the 2010 appointment or extension of an existing contract. In this regard, the CFSC indicated the following:

- "a. There should be no referral to previous contract – this is now a new appointment confined to the recommended service provider.*
- b. Clear deliverables of the proposed contract is needed."*

6.13.2.11 The CFSC further resolved, among others, that the end user should terminate the contract by giving the service provider notice as per clause 5 of the agreement and ***compile a new specification and issue a tender for the new phase if still required taking into consideration the work already performed*** at the various Metrorail regions.(My emphasis).

6.13.2.12 With the evidence submitted by Mr Montana himself, I am unable to conclude as he wants me to, that Mr Lekota was appointed as part of a Board the establishment of the *Board of Inquiry* in relation to the burning of six trains in Pretoria as contended by PRASA.

6.13.2.13 Although documents in respect of the appointment of Dr Chris Dutton and Dr Friedel Mulke, as the other members of the *Board of Inquiry* that Mr Montana submitted he appointed Mr Lekota as part of, were not provided to my office by PRASA the investigation uncovered a publication in the PMG website dated 23 October 2009 in which Mr. M S F de Freitas (DA) MP asked the Minister of Transport the following questions:

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- (a) *Whether any contracts have been awarded to any current or former (a) employees or (b) their spouses and/or (c) families of the Passenger Rail Agency of South Africa (PRASA) or any of its affiliates or subsidiaries in the past three years; if not, what is the position in this regard; if so, what are the relevant details in each case;*
- (b) *what process was followed in awarding each contract, (b) when was each contract awarded and (c) what are the amounts involved for each contract;*
- (c) *whether PRASA's policies allow for (a) employees, (b) their spouses and (c) families to be awarded contracts; if not, what is the position in this regard; if so, what are the relevant details?"*

6.13.2.14 The then Minister of Transport responded as follows to the questions above:

- (a) *Following the train burnings in Tshwane on the 18th January 2008, the Passenger Rail Agency of South Africa (PRASA) appointed Carundell Rail to conduct an audit of Contingency Plans in all the Regions of Metrorail and to develop a Business Continuity Management Strategy for PRASA. **Carundell Rail** was appointed following discussions between PRASA and the Railway Safety Regulator (RSR).*
- (b) ***Carundell Rail**, which is owned by Dr Friedel Mulke, sub-contracted two other companies to assist them with the assignment and these companies are:-*
- *DocD Engineering Services (Owner: Dr Chris Dutton); and*

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- *Lekga Investment Holdings (Owner: Mr. Eddie Lekota, a former employee of the then South African Rail Commuter Corporation Limited (SARCC)).*
- (c) *The cost of the project was R6 942 755. The mandate given to the consultant Carundell Rail was as follows:-*
- *To conduct an audit to determine the compliance, effectiveness, adequacy and relevance of the Contingency Plans within the business environment, i.e.:-*
    - *Identification of shortcomings.*
    - *Correlating proposed mitigating actions initiated by the Head Office, the Regions and the Audit Team as determined from separate risk assessments.*
    - *Recommending corrective actions.*
    - *Proposing mitigating plans/models for effective management of the risk profile.*
    - *Obtaining alignment throughout PRASA with respect to business recovery.*

*The appointment was in accordance with PRASA's Supply Chain Management Policy. PRASA's Supply Chain Management Policy requires that in a case where an employee and an employee's spouse or family have an interest in a contract, the employee must disclose this to the Company and the Group Chief Executive Officer. It is required from the employee to withdraw from participating in any manner whatsoever in the process relating to a contract and its awarding."*

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- 6.13.2.15 This evidence suggests that Mr Lekota was indeed a sub-contractor to Carundell Rail, which was appointed not as a Board of Inquiry but as a consultancy to investigate the train burning matters. I can only reasonably conclude that this was not the same appointment in which Mr Lekota's Lekga Investment Holdings, was appointed directly by PRASA for the ISO 9001: 2000 compliance work.
- 6.13.2.16 I have noted that the Minister of Transport's response that the appointment of Carundell Rail was in accordance with PRASA's Supply Chain Management Policy alluded to above, contradicts the contention by the GCEO in his response to the notice I issued in terms of section 7(9) of the Public Protector Act. The GCEO in that regard contended that it would be practically impossible to go out on a tender process to appoint the experts since that was an emergency. The GCEO further contended that PRASA does not require a procurement process when appointing any Board of Inquiry and denied that the work was improperly awarded.
- 6.13.2.17 It is clear that despite the CFSC's resolution that the end user terminate the contract of Lekga Investment Holdings by giving the service provider notice as per clause 5 of the agreement and compile a new specification and issue a tender for the new phase if still required taking into consideration the work already performed at the various Metrorail regions, the contract was not terminated and neither was a tender issued.
- 6.13.2.18 In the circumstances I am inclined to conclude that the appointment of Lekga Investment Holdings represented by Mr Edwin Lekota did not follow any tender process nor was it an appointment in response to the emergency created by the burning of 6 trains thus permitting deviation from a competitive bidding process.

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6.13.2.19 I must say I am deeply concerned over the stories that seem to have been weaved for this investigation without even checking if the procurement documents submitted back up those stories. This I am afraid is one of those stories.

6.13.2.20 However, I do wish to record that a subsequent allegation from the Complainant which stated that: "Eddie Lekota approached PRASA GCEO and requested that he together with his partner Friedel Mulke be granted a tender for developing a contingency/emergency preparedness programme for Metrorail, This Contract was awarded without following procurement process and procedures", was not supported by any evidence uncovered during the investigation.

**6.14 Complaint 14: Regarding PRASA's alleged improper award of a tender to Umjanji Consortium, for the media, advertising and broadcasting concession agreement:**

6.14.1 Common cause

6.14.1.1 It is common cause that Umjanji Consortium was awarded a tender on Media Advertising and Broadcasting Concession (Tender number HO/CA/739/02/2010) in 2011 following a tender closing date of 11 March 2010.

6.14.1.2 It is also not in dispute that Umjanji Consortium was incorporated on 23 April 2010 as per Registration number 2010/08156/07, which was more than a month after the closing date of the tender. It is also not in dispute that the only constituent member of Umjanji Consortium that attended the compulsory tender briefing on 22 February 2010 was Provantage Media and that the other members, KG Media and Future Growth Foundation, never attended and seem not to have even existed by 11 March 2010.

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6.14.2 Issues in dispute

- 6.14.2.1 The matter factual dispute for my determination was whether or not Umjanji Consortium existed as an entity on the date the tender closed and was accordingly competent to be considered for a valid tender.
- 6.14.2.2 PRASA conceded, in its response received on 29 August 2013 and the response to a notice I issued in terms of section 7(9) of the Public Protector Act that Umjanji Consortium did not exist as a consortium when the compulsory briefing took place and that only Provantage Media attended the briefing.
- 6.14.2.3 PRASA, however, submitted that the incorporation of Umjanji Consortium into a juristic person after the closure of the tender was perfectly valid as consortiums are only registered formally as juristic persons when the award or attender has been confirm and that the award of the tender was compliant with its SCM Policy.
- 6.14.2.4 PRASA submitted that the tender was advertised in The Star, The Sowetan and The Sunday Times newspapers between 19 February 2010 and 21 February 2010. PRASA further submitted that the tender attracted the interest of 19 companies, namely Outdoor Network, Brizovect CC, Urban Signs, Elevated Outdoor, Imbani, Continental Outdoor, Mamela Outdoor, Associated Media, Strawberry Worx, and Primedia, What'd Newq, Provantage Media, Second Harvest, Grant Scher, Zoom, Comutanet, Skylite and Optimum Outdoor.
- 6.14.2.5 PRASA also submitted that Provantage Media, which had attended the compulsory briefing meeting (confirmed by attendance register) joined forces with KG Media and Future Growth Foundation and submitted a joint bid as Umjanji Consortium,

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led by Provantage Media and that Umjanji Consortium scored the highest overall points and the tender was accordingly awarded to it.

6.14.2.6 PRASA also advised that the matter is before a court of Law and as such it is not at liberty to disclose these records, unless authorised to do so by a Court of Law. I do not agree with PRASA's submission in this regard.

6.14.2.7 The following source documents were reviewed and analysed in respect of the appointment of Umjanji Consortium on tender HO/CA/739/02/2010:

Briefing session

6.14.2.8 In terms of the briefing session attendance register dated 22 February 2011 in respect of tender HO/CA/739/02/2010; Sixty four (64) individuals from different entities were in attendance.

Recommendation report

6.14.2.9 The recommendation report for tender HO/CA/739/02/2010 in respect of the successful service provider was addressed to the GCEO by Mr Chris Mbatha, the GCPO. The project description was indicated in the report as Media Advertising and Broadcasting Services. The recommendation report captures the following information in respect of the tender.

Table: Timeline of events

No.	Description	Dates
1.	Date Advertised	19/02/2010 & 21/02/2010
2.	Method of Advertising	The star and Sowetan and Sunday times respectively
3.	Briefing Session	22 February 2010
4.	Closing date & Time	11 March 2010
5.	Closing Venue	12 <sup>th</sup> Floor Umjantshi House SCM Dept. 30 Wolmarans Street Braamfontein
6.	Number of Tenders Received	Deposited in tender box
7.	Tenders received from	Outdoor Network, Brizovect C
8.	Validity expiry date	31 October 2010

6.14.2.10 Paragraph 6 of the report reflects that Nineteen (19) companies responded to the tender and eighteen (18) of the nineteen (19) did not meet all the technical requirements. The request for tender report in respect of this tender was not provided to establish the technical requirements.

6.14.2.11 According to paragraph 6.2 of the report, no tenderers were eliminated. The submissions were scored/evaluated and given marks wherein the submission with highest score was recommended. It appears from this statement that companies that did not meet the technical requirements as per paragraph 6 of the BEC report were further evaluated.

6.14.2.12 According to the recommendation report, Provantage Media scored 68.51 points and were the bidder with the highest points followed by Skylite with 68.03.

6.14.2.13 The following BEC team members supported the recommendation:

Table: BEC Team members

No.	Name	Grade	Department
1.	Mr Tiro Holele	Executive	Marketing and Communications
2.	Ms Mapitso Dlepu	Senior Manager	Marketing and Communications
3.	Ms Maishe Bopape	Senior Manager	Prasa Rail SCM
4.	Ms Zoliswa Copiso	Senior Manager	Corporate SCM
5.	Ms Annette Lindeque	Senior Manager	Intersite
6.	Mr Daluxolo Qabaka	Manager	Corporate BEE
7.	Mr Albert Mduli	Ass Manager	Corporate SCM

6.14.2.14 Paragraph 7 of the report indicates that the members of the Corporate Tender PRASA Board concurred with the recommendation of the BEC.

6.14.2.15 The recommendation was approved by Mr Chris Mbatha and GCEO on 5 November 2010 and 13 December 2010 respectively.

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Notice to proceed

6.14.2.16 A letter dated 31 January 2011 from Ms Matshidiso Mosholi, Manager, Supply Chain Management to Mr Jacques Du Preez, Managing Director, Umjanji Consortium titled notice to proceed, states that the tender dated 25 March 2010 from Umjanji Consortium was approved (The name Provantage Media was also put in brackets on the letter). The tender submission from Umjanji Consortium was however not provided.

Letters to bidders

6.14.2.17 The letters of regret dated 25 February 2011 were sent to various unsuccessful entities. The letters were signed by Ms Matshidiso Mosholi.

Contract

6.14.2.18 The Media advertising and broadcasting concession agreement between PRASA as represented by Intersite and Umjanji Consortium was signed on 27 July 2011 by Mr Jacques Du Preez on behalf of Umjanji Consortium and the CEO of Intersite, Mr TR Kgaboesele as per resolution as stated in the contract.

6.14.2.19 However, the concession agreement concerned was not provided to the investigation team.

Letter from Primedia

6.14.2.20 In terms of the subsequent documents received from the Union, a document entitled annexure J2 was provided. Annexure J2 is letter dated 30 March 2011

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from De Wet, Van Der Watt & Jordan Attorneys (representing Primedia) addressed to the Information Officer of PRASA, Group Corporate Secretary of PRASA and advertising and Wayleaves Consultant. The letter queries the appointment of Umjanji Consortium on tender number HO/CA/739/02/2010. The attorneys alleged amongst other things that Umjanji Consortium was not formed at the close of the tender and that no Umjanji Consortium representatives attended a briefing session.

*The Minister response: National Council of Provinces*

6.14.2.21 I also took into account a written reply from the Minister of Transport obtained for question 118 in the National Council of Provinces (NCOP), publication date ,9 March 2012 regarding *the matter*. *Therein Mr Feldman of Cope asked the Minister of Transport if relevant regulations were followed in the appointment of Umjanji Consortium.*

6.14.2.22 The Minister in response on 6 August 2012 stated that PRASA followed all the relevant regulations and procedures. He further stated that Provantage Media, Out of Home Media, SK Media are joint venture partners that formed Umjanji Consortium.

*Umjanji Consortium registration documents*

6.14.2.23 The company registration certificate obtained on 27 September 2013 from the CIPC in respect of Umjanji Consortium reflects the following information:

- a) Registration number 2010/08156/07;
- b) Registration date 23 April 2010;
- c) Postal address PO Box 3052, Cramer view, 2194; and

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- d) Active directors Mr Ramosa Kabedi, Mr Nkosi Skhumbuzo, Mr Du Preez Jacques Pieter.

6.14.2.24 From the above information it can be noted that the Umjanji Consortium was **registered on 23 April 2010.**

6.14.2.25 It is clear from the evidence that Umjanji Consortium had not been formed or registered at the time the tender was issued and at the date when the tender closed. The legality of the award to a yet to exist legal person will be dealt with in 7 below.

**6.15 Complaint 15: Regarding the GCEO's alleged improper awarding of a contract for the provision of professional advisory service on the signalling project to a friend, Mr Makhensa Mabunda of Siyaya DB, who did not possess the necessary skills and experience and without following proper procurement processes:**

6.15.1 Common cause

6.15.1.1 It is common cause that PRASA awarded a tender HO/INF(S)/203/06/2010: Signal and Telecommunications to Siyaya DB without a competitive or open bidding process

6.15.2 Issues in dispute

6.15.2.1 The factual matter for my determination was whether or not Mr Mabunda, who owns Siyaya got the tender on account of his alleged friendship with the GCEO and does not possess the necessary skills. I also had to make a determination regarding the

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circumstances for choosing Siyaya, which scored the second highest, during the bid evaluation process.

- 6.15.2.2 The investigation did not uncover any evidence which indicates that there is a friendship between the GCEO and Mr Mabunda as alleged.
- 6.15.2.3 Regarding the allegation that Mr Mabunda does not possess the necessary skills and experience, PRASA submitted that Siyaya DB is a BEE company in partnership with Deutsche Bahn International, a subsidiary of a German Conglomerate, Deutsche Bahn. It further submitted that Siyaya DB bids for railway professional services work opportunities in South Africa and that in August 2009 it had issued a tender HO/INF(S)/008/07/2009 for the provision of professional services on the signalling which was awarded to Siyaya DB on 29 January 2010. PRASA submitted that accordingly the allegation that Siyaya DB lacked the required skill and experience and that they were procured improperly is denied.
- 6.15.2.4 PRASA submitted that it issued a tender HO/INF(S)/203/06/2010 on 4 July 2010 which attracted the interest of three bidders namely R&H Railway Consultants, Mott MacDonald South Africa and Siyaya DB Engineers. The tender was awarded to Siyaya DB in accordance with the SCM Policy of PRASA, on account of the highest scorer not meeting PRASA's requirements on BEE and predictable pricing.
- 6.15.2.5 In terms of the unsigned copy of minutes of the CTPC dated 14 October 2010. It was resolved that Mott Macdonald be appointed on tender HO/INF(S)/203/06/2010 at a cost of R53 825 367.12 (Including VAT).
- 6.15.2.6 Based on the memorandum dated 16 November 2010 from Mr Chris Mbatha addressed to the GCEO. Mr Chris Mbatha stated that the bid evaluation committee

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recommended the appointment of Mott Macdonald as preferred vendor and Siyaya DB as the reserved bidder.

6.15.2.7 He indicated that the bid adjudication committee supported the appointment of Mott Macdonald subject to certain conditions being met, a recommendation that was rejected. Mr Chris Mbatha indicated that he had reviewed all circumstances around this tender, applied his mind and submitted as follows:

- "a) The only three bids were received and all three bids were evaluated. These were from Mott Macdonald, Siyaya DB and RH Railways Consultants. The bid prices were in the order of R53 825 367.12, R80 554 406.40 and R81 549 106.56 respectively including VAT and 8% contingency. In terms of the technical evaluation all three entities are equally capable of doing the job as specified.*
- b) That Siyaya DB are our current Transaction Advisors on the National Signalling project on the Gauteng work package.*
- c) That Mott Macdonald does not comply with our minimum BEE requirements and the technical scoring did not reflect this major weakness. PRASA appointed Mott Macdonald on the Key Operations and Efficiency Measures (KOEM) program early this year and they had undertaken a BEE equity of 30% by June 2010. At the time of this tender Mott Macdonald had failed to comply with this undertaking.*
- d) Mott Macdonald's price whilst significantly low, is conditional upon the value of the contract being below R800 million. If the project was to be above R800m, they reserved the right to revise it upwards. We know that the value*

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*of the project is in fact above R800m and therefore the price of R53 825 367.12 is no longer valid.*

- e) Siyaya DB's price and that of R&H Railways Consultants were on par signifying that the two price offerings are probably the correct baseline price. Messrs' Mott Macdonald came way under the two at R54 million but this clearly was not firm.*
- f) Par. 11.7.7 of our SCM policy provides a dispensation that where the appointment of Consultants is concerned preference be given to appointing those for projects where the tasks represents a natural continuation of previous work carried out. Of course all other material factors need to be taken into account.*
- g) Having had cognisance of the above, I therefore recommend as follows:*
- h) That the Bid Evaluations Committee's recommendation that discussions be entered into with Mott Macdonald be rejected;*
- i) That SiyayaDB be appointed as Technical Assistant and Supervisor for the GNC and the Signalling project in the total amount of R80 554 406.40 incl VAT;*
- j) That SCM enters into negotiations with SiyayaDB with a view to reducing their base price by 8%-10% standard SCM practice. These negotiations should also be inclusive of technical considerations by the Chief Engineer: Signaling and Telecoms Mr Sorin Baltac; and*

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- k) *That PRASA considers widening the scope of this transaction to include the Western Cape and Kwazulu Natal legs of this National Signaling Project and that the appointment includes the two extra regions- again as a natural continuation to work in Gauteng. This calls for my office to request proposals from SDB on extra work and further negotiations*

*IT is my considered view as Chief Procurement Officer that this approach is in the best interest of PRASA as it will ensure that:*

- a) *PRASA harvests immediate costs benefits accruing from continuity. SiyayaDB has done sterling work on the project so far as Transaction Advisors; and*
- b) *PRASA ramps up on the BEE targets in keeping with the PRASA Board's and the Shareholders' aspiration."*

6.15.2.8 The memo was signed by Mr Chris Mbatha and approved by the GCEO on 20 November 2010 and 26 November 2010 respectively.

6.15.2.9 A memo titled "Tender Advice" dated 26 November 2010 was issued by Ms Matshidiso Mosholi to Ms Sorin Baltac, Infrastructure department, Head office. The tender advice indicated that Siyaya DB were appointed on tender HO/INF (S)/203/06/2010 for a total amount of R80 554 406.40(Including VAT).

6.15.2.10 Furthermore, a notice to proceed was sent to Siyaya DB on 7 December 2010 by Ms Matshidiso Mosholi. The letter captured the fact that the tender dated 26 July 2010 for Technical assistance and supervision of a signalling project at a total amount of R74 110 053.88(VAT inclusive) was approved for a 5 year period.

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Having evaluated the evidence I am satisfied that PRASA did choose a second bidder but that bidder was adjudicated as competent. I am also satisfied that there were outstanding questions about the bid that scored the highest, which questions principally threw into question, the predictability of pricing and the BEE status of the company.

**6.16 Complaint 16: Regarding PRASA's alleged improper awarding of a tender in the amount of R22 million for Park Station Development Framework to ARUP, a company associated with a board member:**

6.16.1 Common cause

6.16.1.1 It is common cause that PRASA through its subsidiary, PRASA Corporate Real Estate Solutions (PRASA CRES), appointed ARUP on 27 November 2009 on a contract for the Park Station Development Framework for the amount of R3 898 940.00 without following proper tender procurement processes.

6.16.1.2 PRASA conceded in its responses received on 13 March 2013 and 29 August 2013 respectively that the appointment of ARUP was irregular and advised in this regard that ARUP's contract was never approved as it was improperly negotiated by the former CEO of Intersite (*sic*), Mr Cromet Molepo (Mr Molepo).

6.16.2 Issues in dispute

6.16.2.1 The matter for my determination was whether or not disciplinary action was taken against the employees responsible for the irregular award of the contract to ARUP.

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- 6.16.2.2 PRASA submitted that Mr Molepo was subjected to a proper disciplinary action after the appointment of ARUP, which led to his subsequent dismissal.
- 6.16.2.3 However, Mr Molepo disputed PRASA's submission that he was dismissed for issues relating to the appointment of ARUP and submitted that he was unfairly dismissed for unrelated reasons. In his evidence, he submitted that he challenged the dismissal at the CCMA which reinstated him through an arbitration award of 14 August 2012 with a back payment of R1 174 443.00, which PRASA challenged at the Labour Court.
- 6.16.2.4 PRASA failed to provide documents relating to the dismissal of Mr Molepo, citing the reason that the matter was before a court of law. Furthermore, although PRASA indicated that Mr Molepo was disciplined for the alleged irregular appointment of ARUP, there is no information provided as to whether the contract was terminated or not after PRASA had discovered that the service provider was improperly appointed.
- 6.16.2.5 Furthermore, a letter submitted as evidence by PRASA dated 21 June 2011 from Mr Montana to Mr Molepo, provides for the placement of Mr Molepo on special leave for reasons of allegations of tender irregularities, breach of the PRASA SCM Policy and the Code of Conduct by three officials within the PRASA CRES. However, no specific allegation of the appointment of ARUP by Mr Molepo is cited as the reason for taking action against him.
- 6.16.2.6 The issue of the dismissal of Mr Molepo is fully canvassed in the matter relating to the dismissal of Executives in the report.
- 6.16.2.7 A Tender Recommendation for Approval of the appointment of ARUP obtained as evidence shows that same was signed by Mr Ian Scott, Executive Strategy and Business Management and the General Manager SCM, Mr Khulu Mchuba and

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approved by the Chairperson of the Tender and Procurement Committee (TPC), Ms Thobeka Mahlati on 27 November 2009.

6.16.2.8 The Tender Recommendation for Approval document proposed that the Integrated Development Framework for Park station be created and formalised for implementation. It indicates that the framework was to be developed in a two phase approach, the total cost being R3 898 940.00.

6.16.2.9 As far as the issue relating to the involvement of a member of the board with ARUP at the time when the Park Station Development Framework tender was processed is concerned, the evidence received indicates the member as Dr Bridgette Gasa (Dr Gasa), a director at ARUP from 09 February 2011. However, the Disclosure of Interest Form signed on 20 July 2011 indicates that Dr Gasa had made the necessary disclosures of her interests to PRASA.

6.16.2.10 ARUP SA (Pty) Ltd was indeed awarded a contract by PRASA on 21 June 2011 for the Park Station Development Framework, which was a month before Dr Gasa made her Disclosure of Interest at ARUP. However, the contract was for R3.8 million which would not have required Board approval.

### **6.17 Complaint 17: Regarding PRASA's alleged improper engagement of various construction companies in respect of 2010 Soccer World Cup Projects:**

#### **6.17.1 Common cause**

6.17.1.1 It is common cause that during 2010, PRASA engaged various companies in respect of the FIFA World Cup Projects.

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6.17.2 Issues in dispute

- 6.17.2.1 The matter for my determination was whether or not PRASA did not follow the procedures set out in its SCM Policy when procuring the services of the said companies and if any fruitless or wasteful expenditure was incurred.
- 6.17.2.2 PRASA, in its response dated 29 August 2013 and its response to the notice I issued in terms of section 7(9) of the Public Protector Act, denied the allegation that the awarding of tenders to the companies for the 2010 FIFA World Cup Projects was irregular. Mr Montana maintained that all projects undertaken in preparation for the 2010 Soccer World Cup followed an open, transparent, fair and competitive bidding process and that in all the contracts awarded to contractors, such projects were properly advertised as per the requirements of the PRASA SCM Policy.
- 6.17.2.3 He advised that PRASA went out on tender under the banner of 2010 Turn-Around Strategy in October 2007 which attracted 258 suppliers, and 104 bids covering various technical disciplines for which briefing sessions were held in all of PRASA's operational centers that were subjected to a rigorous evaluation process.
- 6.17.2.4 However, PRASA did not provide any relevant tender documents. I have also not discovered any evidence during the course of the investigation, which proves the allegation that various construction companies were improperly appointed for the 2010 Soccer World Cup Project.
- 6.17.2.5 PRASA also denied the allegation that there was an over-expenditure of R2 billion incurred on its CAPEX Budget as a result of the engagement of various companies which amounted to fruitless and wasteful expenditure.

6.17.2.6 I have perused the documents relating to PRASA's Budget and Financial Statements for the period in issue submitted by PRASA. The statements support the allegation that there was over expenditure. The over expenditure on the Capital Budget amounted to R1 286 659 000 and R715 379 000 for the 2008/9, 2009/10 respectively. The over expenditure is captured in the table below:

Table: Over expenditure

No.	Expenditure	2008/9	2009/10
1.	over expenditure	1 286 659 000	715 379 000

6.17.2.7 According to page 24 and page 32 of 2008/9 and 2009/10 Financial Statements respectively under the heading "PRASA's Performance against objectives", CAPEX Over-expenditure was incurred in the said financial periods. The details (including reasons) of the over expenditure are captured in the table below:

Table: Capex over expenditure

Year	Measure	Target	Actual	Variance	Analysis and comment
2008/9	Capex programme spending	5% Variance	35% Overspent	30% Variance	<p>The over-expenditure is due to the increased costs of delivering the Accelerated Rolling Stock Programme, Station Development Programme and 2010 FIFA world cup projects. Notwithstanding provisions of the PFMA, a strategic decision was made not to cut down on the capital expenditure due to the special circumstances and challenges facing commuter rail. Given its 'knife edge' status, it was believed that a reduction in capital expenditure would have serious negative consequences.</p> <p>In the beginning of 2008/9 financial year, it was established that there was a budgetary shortfall of R1042, 4 million on the accelerated rolling stock programme.</p>



					Forecasts showed that this programme would exceed the R1.5 billion budget from November 2008.  As envisaged, material costs increased dramatically in the past quarter of 2008.
2009/10	Capital(project expenditure management)	5% variance	+19.1%	14.1% above	The amount is inclusive of 2010 FIFA World Cup capital projects that was the main reason for the overspend

6.17.2.8 I have noticed that the Auditor General indicated in his Annual Report of PRASA for the year ended 2008/9 and 2009/10 on pages 52 and 44 respectively indicated that fruitless and wasteful expenditure incurred by PRASA was only in respect of interest on overdue creditors.

6.17.2.9 Furthermore, I have observed on page 92 of the PRASA’s 2009/10 Annual Report that PRASA also does not recognise the expenditure on the FIFA World Cup as fruitless and wasteful expenditure.

6.17.2.10 In the absence of evidence regarding the appointment of construction companies for the 2010 Soccer World Cup Project, I could not make a determination whether or not the appointments concerned were lawful.

6.17.2.11 Regarding the over expenditure, there seems to have been some over expenditure although not mentioned by the Auditor General.

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**6.18 Complaint 18: Regarding PRASA's alleged failure to investigate the theft of buses of its subsidiary, Autopax:**

6.18.1 Common cause

6.18.1.1 It is common cause that during January 2010, a subsidiary of PRASA, Autopax, lost two buses with registration numbers ZFG5469GP and YVV793GP through of theft.

6.18.2 Issues in dispute

6.18.2.1 The matter for my determination was whether or not PRASA failed to take disciplinary action against personnel responsible for the lapses that led to the buses being stolen.

6.18.2.2 PRASA denied that it failed to investigate the theft in question as alleged by the Complainant. In its response received on 29 August 2013 regarding this particular allegation, PRASA submitted that an extensive investigation involving the South African Police Service (SAPS) was undertaken and disciplinary steps subsequently taken resulting in the dismissal of a senior official at Autopax. It provided evidence, including a report addressed to the GCEO, showing that a criminal case of theft with the SAPS at Pretoria Central under case number CAS 1089/01/2010 and follow up action was being take. The report further showed that additional measures had been adopted to strengthen internal controls in the fleet management system.

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6.18.2.3 PRASA further denied that its management did not follow through the investigation of the stolen buses and submitted a letter dated 25 January 2010 from the Head Corporate Security, Mr Kabelo Mantsane (Mr Mantsane), addressed to the CEO of Autopax, Mr Saki Zamxaka (Mr Zamxaka) which related to the bus with registration YVV793GP. It provided that:

*"Autopax stage their buses in bus depot situated in Salvokop Pretoria. On 21 January 2010 at about 20H10 a new Mercedes Benz bus with registration YVV 793 GP was reported stolen from the depot. A criminal case of the theft was immediately opened with the SAPS Pretoria Central with case number CAS 1089/01/2010.*

..

*All the security stakeholders were immediately notified about the incident to assist in locating the stolen bus. It is the first time in the company history that a bus has been stolen from the depot in Salvokop. The replacement value of the bus is estimated at R2.8m."*

6.18.2.4 I have also noticed that, as a call for strengthening internal control measures, the report concluded that:

*"The role of security within PRASA Group should be given the recognition it deserves. Security advising should always be proactively sourced to avoid or mitigate incidents of criminality from taking place. The observation is that security within PRASA is treated as reactionary means rather than proactive intervention that should be engaged at any stage of the project; and*

*To maintain effective security at Autopax Pretoria Depot, there must be general acceptance that every employee of the company has responsibility for security and must be involved in protecting the interest of Autopax."*

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- 6.18.2.5 A "Follow up Report on theft of Autopax bus white Mercedes Benz Reg YVV 793 GP" dated 9 July 2010 issued to Mr Mantsane from Corporate Investigation further corroborate PRASA's submission as it provides details on attempts to track the missing bus in Botswana with the assistance of Interpol.
- 6.18.2.6 PRASA further submitted that as a result of the theft of the two buses concerned, disciplinary action was taken against the officials implicated in the breach of the relevant PRASA's security control measures. A letter dated 13 July 2010, indicating that the Senior Manager Corporate Security, Mr Frans Makgaba (Mr Makgaba), was put on suspension was provided by PRASA.
- 6.18.2.7 Another suspension letter dated 13 July 2010 from Mr Zamxaka to the Executive Manager Operations, Mr Chris Brand (Mr Brand) indicates that Mr Brand was suspended after reporting that, as a second incident, two buses with registration numbers ZGF546GP and ZGV489GP appeared to have left the depots without proper record and that their location was not known. Furthermore, that after the first incident, various measures were to be implemented to ensure that such incidents did not recur.
- 6.18.2.8 A memorandum dated 11 October 2010 from the Presiding officer, Mr Enos Ngutshane, addressed to Mr Chris Brand, reveals that Mr Chris Brand was found guilty of dereliction of duties and responsibilities; alternatively gross negligence or dishonesty; accordingly, Mr Brand was placed on suspension pending an investigation on whether proper procedures were put in place to prevent these incidents from occurring.

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6.18.2.9 The evidence provided by PRASA indicates that PRASA had followed up cases of the stolen buses and did make regular follow up regarding progress of the matter. The evidence also shows that disciplinary action was taken. I am accordingly satisfied that PRASA did its best to recover the stolen buses and to exert accountability on those of its employees it held responsible for security lapses.

**6.19 Complaint 19: Regarding PRASA's alleged improper awarding of a security services contract to Futuris Guarding in April 2010 at Autopax City to City for a total amount of R231 204.00:**

6.19.1 Common cause

6.19.1.1 It is common cause that PRASA through its subsidiary, Autopax appointed Futuris Guarding (Pty) Ltd (Futuris Guarding) on 3 March 2010 on a six months security contract for the Metrorail Gauteng North region on contract 525/2010/GAU/PS, without a tender or competitive bidding process.

6.19.2 Issues in dispute

6.19.2.1 The matter for my determination was whether or not PRASA followed the procedures set out in its SCM Policy when procuring the services of Futuris Guarding.

6.19.2.2 PRASA in its response dated 29 August 2013, conceded that the contract was awarded irregularly and stated that Management detected irregularity in the conclusion of the security contract concerned and took corrective action against the responsible employee.

6.19.2.3 The evidence received from Complainant indicates the following information relied upon by PRASA regarding the appointment of Futuris Guarding on the contract in issue:

6.19.2.4 A quotation dated 20 May 2010 from Marketing Manager, Mr Andre Van Tonder, and ISO of Futuris Guarding addressed to Head of Security, Mr Frans Makgaba (Mr Makgaba) of Autopax, which confirms the acknowledgement for request of quotation, indicates the price structure for security officers as follows:

Table: quotation amount

No.	Description	Amount
1.	Nightshift-4 unarmed Grade D Security Officer @R6950 per guard	26 360.00
2.	Dayshift-2 -Unarmed Grade D Security Officer@ R6590 per guard	13 180.00
3.	Dayshift-1 Additional Grade D guard unarmed @R6590 per guard	6 590.00
4.	1 cell phone @ R600 base radio	600.00
Total		54 337.20

6.19.2.5 An acceptance of quotation of Futuris Guarding was signed by Mr Makgaba on 16 April 2010.

6.19.2.6 According to the memorandum of agreement between Autopax and Futuris Guarding signed on 30 April 2010 by Mr Makgaba on behalf of Autopax, and Mr

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- Aubrey Malema on behalf of Futuris Guarding, the duration of the agreement was from 16 April 2010 to 31 July 2010. However, the amount of the contract was not indicated on this document.
- 6.19.2.7 The price charged by Futuris Guarding was not reflected in the memorandum of agreement. Furthermore under paragraph 3 of the agreement, it is stated that the contractor shall render the services, expertise and facilities to the client as set in “annexure A”. The “annexure A” referred to was also not provided.
- 6.19.2.8 Another memorandum of agreement entered into between Autopax and Futuris Guarding, signed by Mr Mufamadi on 20 July 2010 on behalf of Futuris Guarding, and by Mr Makgaba on 21 July 2010 on behalf of Autopax indicated the period of the agreement as 1 August 2010 to 31 August 2010. Furthermore it is stated under paragraph 3 of the agreement that the contractor shall render the services, expertise and facilities to the client as set in “annexure A”. The “annexure A” referred to was not provided.
- 6.19.2.9 According to the invoices provided by the Complainant, Futuris Guarding charged Autopax a total amount of R231 206.15 (Inclusive of VAT) on a contract for the period from April 2010 to August 2010. The details of the invoices are captured in the table below as follows:

Table: Futuris Guarding invoices

No.	Invoice	Period covered	Invoice number	Amount
1.	20/05/2010	From 16/04/2010 to 30/04/2010	IN104889	22 913.07
2.	20/05/2010	May 2010	IN104890	45 759.60
3.	01/05/2010	May 2010	IN104920	2 716.88
4.	1/06/2010	June 2010	IN104915	53 272.20
5.	1/07/2010	July 2010	IN104945	53 272.20
6.	1/08/2010	August 2010	IN104971	53 272.20
Total				231 206.15

6.19.2.10 I have also been provided with a letter of suspension of Mr Makgaba dated 13 July 2010 from the CEO of Autopax, Mr Saki Zamxaka (Mr Zamxaka), which provides that Mr Makgaba was suspended for amongst other things, the Futuris Guarding Systems contract.

6.19.2.11 The Notice for Hearing dated 2 November 2010 from Mr Zamxaka addressed to Mr Makgaba provides in respect of the appointment of Futuris Guarding that:

*"In your capacity as Senior Manager, Security, you wilfully and intentionally procured the services of Futuris Guarding without following the laid down PRASA Supply Chain Management Policy and or process.*

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*In your capacity as Senior Manager: Security, you undermined the authority of Head: Corporate Security, by violating the directive issued by the GCEO, in relation to contracting of security service providers, and; the subsequent instruction issued by Head: Corporate Security"*

6.19.2.12 According to a memorandum titled "*Termination of Security Contracts*" dated 9 February 2010 from the Regional Chief Protection and Security Services of Metrorail, Mr Steven Nkhuna, addressed to the Regional Manager of Metrorail Gauteng, Ms Nozipho Sangweni, PRASA's Protection and Security Services had embarked on realignment of security needs on all PRASA environments in the Gauteng North and South. The memorandum described its purpose as being to sensitise and inform procurement of Protection and Security Services Department to terminate the then service providers and engage on a new agreement to achieve the realignment process.

6.19.2.13 According to paragraph 3 of the memorandum, the procurement department was requested to issue letters of termination of contracts to the security service providers, indicating the last shift for the security companies as 10 March 2010 at 18:00. The following companies were indicated as the ones due to be terminated:

- Afri Guard;
- Hlanganani;
- National Force Security;
- Advance;
- Vusa-Isizwe;
- Sinqobile;
- Futuris Guarding;
- R1; and

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- Enlightened Security

6.19.2.14 According to the information as captured in the paragraph above, Futuris Guarding was one of the companies that were recommended for termination.

6.19.2.15 A Notice to Proceed signed by Mr Buthelezi on 8 March 2010 and accepted on the same day by PF Momavila (sic) on behalf of Futuris Guarding, indicates that Futuris Guarding's quotation number 525/2010/GAU/PS dated 25 February 2010 regarding the provision of security services for a period of six months in the Protection Services Department of Metrorail Gauteng North, for a maximum amount of R10 629 565.20 had been approved.

6.19.2.16 I have not been provided with any evidence to contradict the information submitted herein above by the Complainant regarding the appointment of Futuris Guarding on the contract in issue.

6.19.2.17 I also need to indicate that during the investigation, I issued a Notice in terms of section 7(9) of the Public Protector Act against Mr Buthelezi and Mr Montana relating to this subject, indicating that at the conclusion of the investigation, I might make an adverse finding against Mr Buthelezi and/or PRASA in the above regard, unless evidence to the contrary is provided.

6.19.2.18 Except for the response from Mr Montana received on 29 August 2013 regarding this particular allegation, which provided that Management detected the irregularity in the conclusion of the particular security contract and that corrective action was taken against the responsible employee, no further information was received. Mr Montana's submission in this regard corroborates the complainant's allegation that Futuris Guarding was appointed improperly.

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6.19.2.19 In the circumstances I am inclined to accept the information provided by the Complainant reflecting the factual state of affairs.

**6.20 Complaint 20: Regarding PRASA's alleged improper termination of the Rasakanya Builders' contract on 1 November 2012:**

6.20.1 Common cause

6.20.1.1 It is common cause that Rasakanya Builders (Rasakanya) was a service provider on a cleaning contract to PRASA's subsidiary, PRASA Corporate Real Estate Solutions (PRASA CRES) and that PRASA terminated its contract on 30 October 2012, through a notice dated 28 September 2012.

6.20.2 Issues in dispute

6.20.2.1 The issue for my determination was whether PRASA violated the contract provisions when terminating the contract in the manner it did.

6.20.2.2 PRASA denied that the termination of Rasakanya's contract was irregular. It submitted that the contract was running on a month-to-month basis and that proper notice of termination was given to Rasakanya. and In its response received on 29 August 2013, PRASA submitted documents relating to the extension of contract between PRASA CRES and Rasakanya and a notice of termination of Rasakanya's contract.

6.20.2.3 On expiry of its contract, a letter dated 09 March 2012 from Senior Manager SCM, Ms Ntombeziningi Shezi advised Rasakanya Builders that its contract was extended on a month-to-month basis with effect from 1 January 2012 at an

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escalation of 7.5% "as per gazetted minimum wage increase for contract cleaning" (sic).

- 6.20.2.4 Eight months after the extension of Rasakanya contract on a month-to-month basis, a notice of termination letter dated 28 September 2012 was addressed to Rasakanya Builders from Ms N Kasane on behalf of PRASA CRES and stated the following: "PRASA Cres is currently engaged in the process of reviewing the contracts that it has with its service providers and as a result of that process, we would like to advise of the following:

*"Your contract that you currently have with PRASA Cres will be terminated with effect from 1<sup>st</sup> November 2012;*

*All invoices relating to services rendered by you to PRASA Cres must be submitted no later than the 30<sup>th</sup> of October 2012;"*

- 6.20.2.5 I have not been provided with evidence in the form of payment schedules relating to PRASA's alleged delay to pay Rasakanya for services rendered to PRASA Cres thereby resulting in 36 employees of Rasakanya not receiving payment.
- 6.20.2.6 However, a former Senior Manager of PRASA revealed during an interview with my investigators that several service providers in PRASA CRES division were often paid late due to lack of financial discipline. Nevertheless, I was not provided with evidence to corroborate this assertion.
- 6.20.2.7 On the main issue of termination, the evidence does corroborate PRASA's submission that the contract was a month to month basis at the time of termination. It further shows that Rasakanya was given a month's notice.

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**6.21 Complaint 21: Regarding the GCEO's/PRASA's alleged improper advance payment of the amount of R 80 million for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds amounting to fruitless and wasteful expenditure:**

6.21.1 Common cause

6.21.1.1 It is common cause that PRASA entered into an agreement with FIFA regarding the 2010 Soccer World Cup events.

6.21.2 Issues in dispute

6.21.2.1 PRASA denied that it had made an advance payment of the amount of R80 million for the FIFA World Cup Sponsorship without proper approval, budget and/or allocated funds which resulted in fruitless and wasteful expenditure.

6.21.2.2 Mr Montana advised, in his response dated 29 August and that following a notice I had issued in terms of section 7(9) of the Public Protector Act, that all PRASA did was to enter into a Value In Kind (VIK) agreement, valued at R80 million wherein PRASA represented by Autopax, undertook to provide "free" transport services to FIFA such as VIP and commuter transport in return for opportunity to market itself on FIFA platforms.

6.21.2.3 PRASA further denied that it invested funds with FIFA based on the agreement that PRASA would recoup the expenditure through the sales of tickets to commuters/soccer fans which it never recouped and thereby resulting in fruitless and wasteful expenditure.

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- 6.21.2.4 Mr Montana submitted that pursuant to the VIK Agreement, PRASA subsidiary, Autopax, purchased 570 new buses and entered into a service level agreement with MATCH to transport the FIFA Family, and Commercial Affiliates at an agreed fee of R172 million during the 2010 World Cup Tournament (Tournament), which at its conclusion led to a dispute between the parties after the reconciliations were done, which were later resolved through arbitration.
- 6.21.2.5 Mr Montana provided the relevant documents regarding the contractual agreements entered into between the Government of the Republic of South Africa, PRASA, Autopax, MATCH and FIFA for the 2010 World Cup. These include a memorandum dated 27 March 2009, which corroborates its version.
- 6.21.2.6 According to ‘Appendix B’ to the agreement, PRASA was to provide the railway transportation services for persons and/or goods (PRODUCTS); and bus transportation services and/or other transportation services other than products to FIFA in South Africa as requested by FIFA or its nominee(s) “up to a value of eighty million South African Rands (ZAR 80 000 000) (the “VIK”)”.
- 6.21.2.7 The submission regarding the R172 million agreement that ended up in arbitration is also corroborated by a lease agreement entered into between PRASA, Autopax and MATCH signed by Mr Montana on 10 June 2010 and Mr Saki Zamxaka on 14 June 2010 on behalf of PRASA and Autopax respectively, and Mr James Byron on 14 June 2010 on behalf of MATCH (Lease Agreement). The agreement shows that it was entered into for the leasing of coaches to MATCH by Autopax and provided under paragraph 5.1 of the agreement that:

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*"The parties hereby agree that PRASA through its subsidiary Autopax shall let and MATCH shall hire the championship period 420 (four hundred and twenty) coaches for utilisation in the Area of Operation."*

- 6.21.2.8 I have noticed in "annexure F" of the Lease Agreement that an amount of R80 million was to be paid directly to Autopax by PRASA in satisfaction of the amounts otherwise due from MATCH under the agreement equal to the anticipated contract value less the cash value. This implies that the R80 million was to be paid to Autopax and not FIFA as the Complainant alleged.
- 6.21.2.9 Mr Montana submitted that a dispute arose between PRASA and MATCH during 2010 Soccer World Cup. In this regard, a settlement agreement between Autopax, PRASA and MATCH, signed by the Mr Montana on behalf of PRASA on 12 April 2011, indicated in paragraph 1 the claimant as PRASA and the defendant as MATCH.
- 6.21.2.10 I have also reviewed a Settlement Agreement from the Arbitration Foundation of South Africa (AFSA) regarding a dispute between the parties dated 12 April 2011, which provided that PRASA and MATCH agreed that MATCH would pay PRASA an all-inclusive ex gratia amount of R42 500 000.00 on or by 13 April 2011, in settlement of PRASA's claim and MATCH would withdraw its counterclaims for repayment of R26 215 200.00 and R80 000 000.00, plus all of the MATCH customer claims in terms of clause 19.1 of Service Level Agreement (SLA).
- 6.21.2.11 The dispute between PRASA and MACTH is captured on page 27 of PRASA's Annual Report for the year ended 31 March 2011 as follows:

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*"PRASA, through its subsidiary Autopax, entered into a service level agreement with MATCH for the provision of bus services, with 420 buses for the duration of the world cup amounting to R174 million. A dispute arose during the World Cup regarding the payment of services related to the contract with MATCH and Autopax. The matter was referred to the Arbitration Foundation of South Africa, which ruled that about R80 million of the value of the contract was not due by MATCH to Autopax. PRASA resolved not to pursue what would have been a costly legal challenge against both FIFA and MATCH."*

6.21.2.12 Furthermore on page 71 of the of PRASA's Annual Report on the 2010/11 Financial Statements, under the heading "Litigation Matters" stated as follows:

*"In the second matter PRASA instituted arbitration proceedings against Match/FIFA for alleged breach of contract pertaining to the service provision by Autopax a wholly owned subsidiary of PRASA, during FIFA World Cup. The matter was finalised and MATCH was ordered to pay a portion of the proved claim and the remainder of R80 million was not paid which was linked to the agreement with FIFA for the National Supporter Status during the Confederations Cup and 2010 FIFA World Cup."*

6.21.2.13 I have not been provided with any evidence to contradict PRASA's submission in the above regard and am therefore inclined to accept it as reflecting the factual state of affairs. I accordingly have no reason to accept that PRASA made any advance payment of R80 million or any amount to FIFA as alleged. What does appear true is that PRASA only got about half of the R80 million it expected to be paid by FIFA for Autopax services.

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**6.22 Complaint 22: Regarding PRASA's alleged improper incurring of R2.2 billion over expenditure on PRASA's operations budget in 2009/10 financial year:**

6.22.1 Common cause

6.22.1.1 It is common cause that PRASA exceeded its Operational Expenditure Budget (OPEX Budget) during the financial year 2009/2010.

6.22.2 Issues in dispute

6.22.2.1 The matter for my determination was the value of the over expenditure amount, which the Complainants placed at R2.2billion.

6.22.2.2 PRASA disputed that it overspent its OPEX Budget by an amount of R2.2 billion which amounted to fruitless and wasteful expenditure during the financial year 2009/2010.

6.22.2.3 In his response dated 5 June 2015 to notice in terms of section 7(9) of the Public Protector Act, 1994, Mr Montana denied that PRASA had incurred an over-expenditure of about R2.2 billion in the 2009/2010 financial year and labelled Complainant's allegation in this regard as "blatantly false". He submitted that the Audited financial Statements of PRASA for the financial year concerned did not record such a loss and that the Auditor-General also did not make any mention of such an over-expenditure as alleged by the Complainant.

6.22.2.4 Mr Montana's assertion was that PRASA as a public entity is audited annually by the office of the Auditor-General and it was therefore inconceivable that an unauthorised over-expenditure of R2.2 billion would escape the attention of the

Auditor-General, and furthermore, that PRASA in the preceding six years had received six unqualified audit opinions from the Auditor General. He provided PRASA's relevant Budgets and Financial Statements for the 2009/2010 financial year, which were reviewed as part of the investigation. copy of the provisional allocations to PRASA-2010 MTEF schedule reflects the following total audited allocations:

Table: 2010 MTEF

No.	Current expenditure	Capital expenditure	Total expenditure
1.	3 185 844	4 296 549	7 482 393

- 6.22.2.5 PRASA's budget including Shosholozza Meyl and Autopax for the financial year 2009/2010 reflects a total OPEX Budget of R6 158 032 233.00
- 6.22.2.6 According to page 58 of the 2009/2010 Annual Report of PRASA on the consolidated financial statements of the comprehensive income for the year ended 31 March 2010, operating expenses incurred amounted to R 6 681 825 000.00
- 6.22.2.7 A total of seven letters dated 19 March 2009 from PRASA Chief Financial Officer, Mr David Kekana addressed to various divisions and subsidiaries of PRASA indicated that SARCC (PRASA) operating budget for 2009/10 was approved by the Board of control (PRASA Board). The allocations made are captured in the table below as follows:

Table: Budget allocation

No.	Division	
1.	Intersite	154 807 553
2.	Autopax	462 928 964
3.	Durban region	626 979 203
4.	Gauteng region	1 876 668 866
5.	Eastern Cape region	100 816 933
6.	Western Cape	922 276 134
7.	Shosholza Meyl	866 100 002
8.	PRASA Head Office	793 221 534
9.	Metro rail	196 253 043
10.	Portfolio	157 980 002
Total		6 158 032 233

6.22.2.8 When comparing the OPEX and the actual budget allocated, it reflected that the OPEX Budget was exceeded by the amount of R523 792 767.00 (R6 681 825 000.00 less actual allocated budget of R6 158 032 233.00).

6.22.2.9 According to page 24 of PRASA's Annual Report for the financial year 2009/10 PRASA on funding, the following was captured in respect of the funding shortfall for the financial year concerned:

*"A funding shortfall of R1 billion earlier in the year under review was identified. A submission for additional funding was discussed and presented to the Department of Transport and National Treasury for 2009/10 Financial Year. The funding shortfall has put PRASA in a weak financial difficult position. If not addressed urgently, it will put PRASA in a weak financial position with the potential to undermine the ability of the entity to finance its future capacity expansion programme. This is a major concern to*

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*the Board and Executive Management of PRASA, with appropriate strategies already put in place to reverse this negative position and place PRASA on the trajectory where it will become a commercially-viable and number one public transport operator."*

6.22.2.10 Evidence from former Group CFO of PRASA received on 24 October 2013 indicates that PRASA's over-expenditure on the OPEX budget was due to inadequate ticket sales.

6.22.2.11 I have not discovered any evidence to contradict the financial statements supplied by PRASA in respect of its financial position for the financial year 2009/2010 and am therefore inclined to accept the disclosed overexpenditure of R523 792 767.00 as reflecting the correct financial state of affairs regarding the OPEX Budget for the financial year concerned.

**6.23 Complaint 23: Regarding PRASA's alleged failure to spend a subsidy received for Shosholoza Meyl for the 2009/2010 period and not use it for its intended purpose:**

6.23.1 Common cause

6.23.1.1 It is common cause that during the financial year 2009/2010, PRASA received funds from the National Treasury during the takeover of Shosholoza Meyl operations.

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6.23.2 Issues in dispute

- 6.23.2.1 The matter for my determination was simply whether or not PRASA misused the Shosholoza Meyl funds for something other than the purpose such funds had been appropriated for.
- 6.23.2.2 PRASA denied that it requested funds amounting to R1 billion from the National Treasury during the financial year 2009/2010 which for the taking over of Shosholoza Meyl which it did not use for its intended purpose.
- 6.23.2.3 Mr Montana submitted in PRASA's response received on 29 August 2013 and his response to notice in terms of section 7(9) of the Public Protector Act, 1994 regarding this particular allegation, that Shosholoza Meyl which formed part of the Transnet Group was transferred to PRASA on 1 April 2009 as part of a consolidation of passenger rail entities into a single entity that would report to the Minister of Transport as per Cabinet decision of 1 December 2004.
- 6.23.2.4 Mr Montana denied misuse of Shosholoza Meyl funds and that an amount of R2.2 billion was ever allocated for Shosholoza Meyl. He advised that the SARCC, the predecessor of PRASA, was allocated R500 million for 2008/2009, R450 million in 2009/2010 and R424 million in 2010/2011 for purposes of Shosholoza Meyl operations. He advised that the R500 million was paid over in full by the SARCC to Transnet, the previous owner of Shosholoza Meyl, who kept its operations running as a discontinued business on behalf of the SARCC and Transnet were awaiting the passing of the Amendments to the Legal Succession Act, which was a key condition for the consolidation of passenger rail entities, which was signed into law in December 2008, and thus enabling the transfer of Shosholoza Meyl into PRASA

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in April 2009. He alleged that he did not approve the retention of the R500 million as requested by the former GCFO of PRASA.

6.23.2.5 Mr Montana provided the SARCC/PRASA's Annual Reports and Audited Financial Statements for the financial years 2008/2009 and 2009/2010 and 2010/2011.

6.23.2.6 Furthermore, Financial Statements of PRASA for 2008/09 financial year confirm on note 17, under accounts payable, that an amount of R500 million was received from The Department of Transport as subsidy for the Shosholoza Meyl and further that R500 million was payable to Transnet.

6.23.2.7 The Financial Statements of PRASA for 2009/10 financial year reflect on page 78 under accounts payable a nil amount in respect of Transnet payable. This is a reflection that the payable in the amount of R500 million was settled in favour of Transnet in year 2010.

6.23.2.8 According to the Financial Statements for 2008/9 period and 2010/11, the government grant allocated was in the amount of R2 549 604 000 and R3 185 843 000 respectively. The grant in respect of Shosholoza Meyl was not separately disclosed in these Financial Statements.

6.23.2.9 Based on the copy of the budget for the years ending 2008/9 and 2009/10, the following was indicated as subsidy for Shosholoza Meyl:

Table: Shosholoza Meyl subsidy allocation

No.	2007/8	2008/9	2009/10
1.	375 000 000	500 000 000	450 000 000

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### Documents received from National Treasury

6.23.2.10 Documents received from the National Treasury reflect the request for additional funding by PRASA in respect of Shosholozza Meyl but also confirm the allocations as reflected in the PRASA financial statements.

6.23.2.11 I have not discovered any evidence to contradict PRASA's submission regarding the above allegation that it did not receive an amount of R2 billion from the National Treasury during the financial year 2009/2010 for the Shosholozza Meyl operations, which was not used for its intended purpose.

### **6.24 Complaint 24: Regarding PRASA's alleged incurring of a rental expenditure on Jorissen's Place after vacating the building and before the expiry of the contract resulting in fruitless and wasteful expenditure:**

#### 6.24.1 Common cause

6.24.1.1 It is common cause that PRASA moved its Head Office from Jorissen's Place before the expiry of the Lease Agreement with Liberty Group Limited (Liberty) after acquiring Umjantshi House from Transnet and continued to pay rental for the duration of its Lease Agreement, which was about 20 months.

6.24.1.2 PRASA did not deny relocating its Head Office from Jorissen's Place to Umjantshi House but justified the premature move on giving effect to a Cabinet Decision of 2004 on the consolidation of SARCC, its subsidiary Intersite, Shosholozza Meyl and Metrorail, which created a necessity to seek office accommodation which was suitable to house these entities in one building.

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6.24.2 Issues in dispute

6.24.2.1 PRASA denied that it vacated Jorissen's Place 14 months prior to the expiry of the Lease Agreement with Liberty and that the rental paid to Liberty during the duration of the Lease Agreement after acquiring Umjantshi House from Transnet amounted to fruitless and wasteful expenditure.

6.24.2.2 It argued that when PRASA Head Office was moved to Umjantshi House, Jorissen's Place and Woodmead Building's IT Infrastructure was left behind and the properties were also used as training facilities for PRASA. I failed to understand how a building could be leased for all lettable space for 20 months just to occasionally use some of the space for training and to keep IT infrastructure, which should have moved to the new building, which eventually happened.

6.24.2.3 It is worth noting that the Lease Agreement between the parties provided for an option for SARCC Metrorail to buy the building after the expiry of the Lease Agreement, however, PRASA submitted that Liberty Life, the owners of the Jorissen's Place, opted to retain the building and accordingly the transaction did not materialise.

6.24.2.4 It is further worth noting that the Lease Agreement further provided at paragraph 9 in respect of subletting and cession that:

*"The tenant shall not be entitled to sublet the whole or any part of the premises save as follows:*

- *Paragraph 9.1.1- If the tenant wishes to sublet, it shall apply to the landlord in writing for its consent to the subletting of the premises or part thereof*

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*giving, in regard to the proposed sublease ...,"* which option could have been explored during the 20 month period of non occupancy.

6.24.2.5 I am satisfied, accordingly that, with the Board's approval, the PRASA GCEO, caused the Jorissen's Place property to be left vacant for a 20 month period during which, full occupancy rent was paid for value not received. Even if it's true that the property was, during the period, used for training and to house IT infrastructure, that would not take away the fact that rental for total lettable space was paid without value for such.

## **6.25 Complaint 25: Regarding PRASA's alleged improper procurement of Umjantshi House from Transnet in September 2009:**

### 6.25.1 Common cause

6.25.1.1 It is common cause that PRASA moved its Head Office from the Jorissen's Place after acquiring Umjantshi House to accommodate its Head Office staff in November 2009.

### 6.25.2 Issues in dispute

6.25.2.1 The matter for my determination was whether or not the acquisition of Umjantshi House did not follow due process as prescribed in the SCM Policy.

6.25.2.2 PRASA, in its response received on 29 August 2013, and in the reponse to the notice I issued in terms of sectiib 7(9) of the Public Protector Act, denied that it acquired Umjantshi House irregularly without following a proper tender process.

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6.25.2.3 The Agreement of Sale between PRASA and Transnet in respect of Umjantshi House signed on 28 September 2009 by Mr. Montana on behalf of PRASA and by an unidentified individual on behalf of Transnet on 13 January 2010, provides that PRASA purchased Umjantshi House from Transnet in 2009 for the sum of R129 500 000.00 (Including VAT), with effect from 27 March 2009.

6.25.2.4 I have not been provided with the procurement documents in respect of the acquisition of Umjantshi House, except the Agreement of Sale and payments records between PRASA and Transnet. Because of this I am unable to determine if the process followed was one of the competitive processes outlined in the SCM Policy.

**6.26 Complaint 26: Regarding PRASA's alleged improper incurring of a rental expenditure on Intersite Building after vacating the building and before the expiry of the contract resulting in fruitless and wasteful expenditure:**

6.26.1 Common cause

6.26.1.1 It is common cause that PRASA moved its offices from Intersite Building in Woodmead and Jorissen's Place before the expiry of the Lease Agreement and continued to pay rental for the duration of its Lease Agreement for the Intersite Building.

6.26.1.2 PRASA did not deny that it prematurely vacated its premises to move to Umjantshi House ending up incurring full rental for the vacant space. It simply justified the premature move on the basis of a supposed Cabinet Decision of 2004 requiring the consolidation of SARCC and its subsidiary Intersite, Shosholozza Meyl and

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Metrorail, which necessitated office accommodation which was suitable to house these entities in one building.

6.26.2 Issues in dispute

6.26.2.1 The issue for my determination was whether or not Cabinet ordered the move and if the space was indeed vacant for a long time during which PRASA incurred rental expenditure without value for the expenditure.

6.26.2.2 PRASA, in its submission on 29 August 2013 and, subsequently, in response to a notice I had issued in terms of section 7(9) of the Public Protector Act, denied that the building was left empty. a the GCEO submitted that when PRASA Head Office was moved to Umjantshi House afterward, Jorissen's Place and Intersite Building retained IT Infrastructure and the properties were also used as training facilities for PRASA.

6.26.2.3 It is inconceivable that both Jorrissen's Place and the Intersite building could have been meaningfully used for training to the extent of setting off the rental paid. With regard to the IT infrastructure, leaving it in the building and not migrating it to Umjantshi House does not make sense. In any event the value paid for full lettable space cannot be offset by miniscule value that may not have been obtained from housing IT infrastructure.

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**6.27 Complaint 27: Regarding the GCEO's alleged improper termination of contracts of Executives resulting in fruitless and wasteful expenditure amounting to an estimated R5 million:**

6.27.1 Common cause

6.27.2 It is common cause that during the period 2008 and 2013, Mr Montana dismissed several Senior Executives whom the CCMA ordered their reinstatement. It is also common cause that Mr Montana and some of the Executives concerned entered into settlement agreements instead of reinstatement.

6.27.3 Mr Montana did not dispute that the dismissals took place and that some were either reversed by the CCCMA or settled thereunder. The justification offered by Mr Montana in entering into settlement agreements was that employment involves a relationship of trust between the employer and employee and that if the trust is broken, there wouldn't be a normal working relationship.

6.27.4 Issues in dispute

6.27.4.1 The issue for my determination was whether or not proper procedures were followed by PRASA before the terminations and/or suspensions were executed.

6.27.4.2 PRASA denied that it improperly terminated the contracts of Senior Executives, namely: COO Metrorail Mr Salani Sithole; CEO Metrorail Mr Sisa Mtwana; GE HR, Ms Liz Choonaira (allegedly replaced by GCEO's uncle Mr. Mphefo Ramutloa); CEO Shosholozza Meyl, Mr Viwe Mlenzana; CFO PRASA Ms Sindi Mabaso-Koyana; RM Eastern Cape Ms Claudia Williams; and CEO PRASA CRES Mr Cromet Molepo, and that it improperly offered them compensation of approximately

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R5 million that resulted in fruitless and wasteful expenditure when the CCMA ordered their reinstatement.

- 6.27.4.3 Mr Montana further denied that the wasteful practices exposed PRASA to litigation and unnecessary costs incurred as the GCEO disregarded the Labour Relations Act and PFMA principles.
- 6.27.4.4 On the allegation that he had preferentially treated and protected his alleged uncle, Mr Mphefo Ramutloa, Mr Montana, in his response which was received on 29 August 2013 and subsequently, following my issuing of a notice in terms of section 7(9) of the Public Protector Act, argued that the only relationship that existed between himself and Mr Ramutloa, whom he allegedly employed to replace the GE: Human Resource, is that of employer and employee and that in so far as the issue of dismissal of employees was concerned, PRASA maintained that it is the prerogative of an employer to maintain order and discipline in the workplace.
- 6.27.4.5 Mr Montana submitted that all the Executives who had left the employment of PRASA were where circumstances permit, first given an opportunity to be heard and be required to make representations as to why action should not be taken against them, and where parties cannot agree on the form of discipline, a matter would be referred to an independent arbitrator. No evidence was provided to support this submission.
- 6.27.4.6 Mr Montana submitted further that in some cases the employer and the employee are able to agree to an amicable parting of ways. In this case, parties are at liberty to conclude a settlement agreement which would record the terms of their separation. However, Mr Montana acknowledged that there are extreme cases

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where an Executive would opt to pursue the matter through forums such as the CCMA or the Labour Court.

- 6.27.4.7 Initially, Mr Montana argued that he was of the firm view that the Office of the Public Protector does not have the jurisdiction on the matters that are before the court of law. In this regard, Mr Montana was duly advised that the law is clear that only matters where a court of law has pronounced is the Public Protector's jurisdiction ousted and that pending matters are not decisions of courts as envisaged in section 182(3) of the Constitution.
- 6.27.4.8 In support of his response, Mr Montana provided the settlement agreements entered into between PRASA and Ms Sindi Mabaso-Koyana which I have noted. I have also reviewed documents submitted by some of the affected Executives and also considered their evidence relating to this matter.

**Mr Salani Sithole**

- 6.27.4.9 A settlement letter dated 8 October 2008 from Mr Montana addressed to Mr Salani Sithole (Mr Sithole) stated the following amongst other things:

*"The Corporation believes that the breakdown of trust and confidence is the basis upon which the settlement shall be formed and achieved. Accordingly and given your unwillingness to accept what the Corporation deems as fair and reasonable settlement offer, in the circumstance, the same settlement offer is hereby formally withdrawn.*

*In the circumstances, the Corporation maintains that there is a breakdown of trust and is accordingly left with no option but to release you from your duties effectively and immediately".*

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- 6.27.4.10 According to the letter, there was an offer of settlement made to Mr Sithole before he took the matter to the CCMA. This can be a reflection of the fact that there was no disciplinary hearing in respect of the matter concerned.
- 6.27.4.11 Memorandum of settlement agreement regarding Mr Sithole dated 7 October 2009 signed by the then Group Executive Legal and Risk, Mr Lindikhaya Zide, (Mr Zide) and approved by Acting Group Executive: Human Resources, Mr Mphefo Ramutloa, indicated its purpose as to seek approval for payment of settlement for Mr Sithole regarding the dispute under case no GAJB 32811/08 lodged with the CCMA.
- 6.27.4.12 According to the memorandum, Mr Sithole instituted proceedings by way of a Referral Form 7.11 at the CCMA under case number GAJB 32811/08 on 26 November 2008, on the grounds of alleged unfair dismissal dated 8 October 2008. The memorandum captured the fact that it was common cause that the employment relationship between the parties had irretrievably broken down and indicated the financial implication of the settlement as R972 150.00 and a net payment of R583 290.00 after tax. According to the account payment schedules, payment was made to Mr Sithole on 21 October 2009.

**Mr Viwe Mlenzana**

- 6.27.4.13 According to the Labour Court document in the matter between PRASA and Mr Viwe Mlenzana under Case number: J1687/11 signed on 8 November 2011 by Mr Viwe Mlenzana (Mr Mlenzana) on behalf of PRASA, a settlement amount of R988 936.07 before tax was noted in favour of Mr Mlenzana. It was further stated that PRASA would pay the legal costs which had been agreed to be party and party costs, occasioned by its non-compliance with the Settlement Agreement.

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This points to a lack of adherence to the labour laws and processes by PRASA and supports the allegation by the Complainant in this regard.

**Ms Sindi Mabaso-Koyana**

6.27.4.14 The Settlement Agreement in respect of former CFO of PRASA, Ms Sindi Mabaso-Koyana (Ms Mabaso-Koyana) signed on 30 April 2013 after her employment contract was terminated, indicates that there was a dispute between PRASA and Ms Mabaso-Koyana in relation to the circumstances in which her employment was terminated.

6.27.4.15 The Settlement Agreement captures the fact that Ms Mabaso-Koyana and PRASA were desirous of resolving the dispute between them and accordingly record the terms of settlement as per the agreement and that all disputes and claims of whatsoever nature between the parties have been fully and finally been settled. It provides in this regard that:

*“The agreement is reached without admission of liability by either party, and simply for the sake of avoidance of further disputes between the parties and all disputes from each party to this agreement pertaining to activities of PRASA and Mabaso-Koyana in relation to the contract of employment is put in finality.”*

6.27.4.16 The Settlement Agreement indicates that PRASA agreed to pay to Ms Mabaso-Koyana R1 855 649.25 being the equivalent of seven months’ salary.

6.27.4.17 In his response received on 05 June 2015 to notice in terms of section 7(9) of the Public Protector Act, Mr Montana argued that Ms Mabaso-Koyana was employed as PRASA’s Group CFO had been released on account of performance related matters and conduct that he as GCEO disapproved of. He advised that he sought

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and obtained the concurrence of the Board on the matter. Mr Montana did not advise on the issue at hand which was whether or not procedure prescribed for disciplinary processes, was followed by him.

6.27.4.18 Ms Mabaso-Koyana, on the other hand addressed the procedural issue in her submission, wherein she maintained that Mr Montana dismissed her unfairly without following a proper disciplinary process for reasons that she was not consulted on matters that related to finance and procurement, despite her being the CFO of PRASA, that she questioned certain payments which were not properly motivated and was not allowed to properly run the financial division as the CFO.

6.27.4.19 In the absence of evidence to support Mr Montana's contention regarding the reasons for Ms Mabaso-Koyana's dismissal and regarding the process followed by Mr Montana in the dismissal her dismissal, I was unable to accept Mr Montana's version despite it being passionately argued, including him blaming Ms Mabaso-Koyana, for the SATAWU dossier that led to this investigation.

**Mr Cromet Molepo**

6.27.4.20 According to the CCMA documents, the arbitration award dated 14 August 2012 provides among others at paragraph 3 in respect of the dispute between Mr Cromet Molepo (Mr Molepo) and PRASA that Mr Molepo, was employed by PRASA from 1 October 2010 at a remuneration package of R2 800 000.00 per annum and was place on special leave at after a meeting held with the Mr Montana on 21 June 2011 pending the finalisation of a Forensic Audit;

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- 6.27.4.21 On 2 August 2011 Mr Molepo met with the Mr Montana who informed him that that he would not be returning to work as the CEO of PRASA CRES, and was given a week to consider the following three options: having his special leave converted to a suspension pending an investigation; concluding a separation agreement; and be redeployed as Mr Montana's special advisor.
- 6.27.4.22 Another meeting was held on 05 September 2011 between Mr Montana and Mr Molepo wherein the latter opted for an appointment as special advisor. Mr Molepo asked for this agreement to be in writing and that the job must be graded, a job profile created and placed on the structure and Mr Montana informed Mr Molepo that he had asked Mr Zide to prepare the relevant contract.
- 6.27.4.23 It is further stated that on 03 October 2011 the employee forwarded a letter to the Mr Montana raising his frustration of not receiving the contract and on 30 January 2012, Mr Montana sent an email to Mr Molepo informing him that he was expected to report for duty on 31 (*sic*) February 2012.
- 6.27.4.24 A letter emailed to Mr Montana on 31 January 2012 by Mr Molepo indicated amongst others that Mr Molepo did not receive an agreement from Mr Zide, and further stated that his proposed redeployment constitutes a unilateral demotion and that he cannot accept such demotion; once the reporting date was clarified he would report for duty on condition that the instruction was that he would report for duty in the position as set out in Mr Montana's letter dated 27 January 2012; and If he was redeployed as the special advisor, he would immediately lodge an unfair labour practice dispute pertaining to a demotion and unilateral change of terms of employment.

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6.27.4.25 Mr Molepo, in his evidence, stated that it was upon that basis that Mr Montana terminated his employment contract on 1 February 2012 in an email, the reason amongst others being that Mr Molepo was directly repudiating an agreement they had. However, an award was made in favour of Mr Molepo at the CCMA, on 14 August 2012 with an order that he be reinstated and that PRASA pay him back the amount of R1 174 443.00 for the period from 2 March 2012 (date of referral to the CCMA) and 3 August 2012 (final date of arbitration) in respect of the period he was suspended.

6.27.4.26 The award was, however, challenged by PRASA in their application for leave to appeal dated 25 July 2013. No further documents were provided by PRASA on this case. PRASA indicated in their response to the allegation that the case was still with the courts. However, I have been provided with further evidence regarding this subject by Mr Molepo.

**Further evidence received:**

6.27.4.27 According to a former Senior Manager of PRASA's evidence, the Group Executives were hired and fired by the GCEO and the HRD.

**Further evidence received from Mr Cromet Molepo**

6.27.4.28 Mr Molepo was interviewed by the investigation team on 25 July 2014. He provided various documents including the CCMA award, Labour Court Order dated 17 July 2013 and various correspondences between his attorneys and PRASA, the former Chairman and certain members of the PRASA Board.

6.27.4.29 Evidence indicates that the CCMA Award made in favour of Mr Molepo on 14 August 2012 was challenged by PRASA and the matter had since been finalised in

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the Labour Court. In a judgment handed down by Honourable Mooki AJ, who made serious findings on the conduct of PRASA, the Judge stated that:-

*"It is a serious matter when an attorney puts his hand to a document intended to be part of the court process when such a document contains falsehoods, and when the court in turn is called to determine a particular matter based on the content of such a document. Mr. Lucky Makhubela signed the notice upon which PRASA makes its application. Mr Makhubela has no personal knowledge of what transpired in court on 7 July 2013...Mr Makhubela failed to comply with what is expected of him as an officer of the court. He conducted himself in an irresponsible manner in putting his hand to an application on the stated grounds. He owes the court a duty to uphold the dignity of the court. He failed to discharge that duty in putting his hand to a document that contains demonstrably false statements about what transpired in court. I find that an order of costs de bonis propriis is appropriate."*

6.27.4.30 In his response dated 05 June 2015 to notice in terms of section 7(9) of the Public Protector Act, Mr Montana argued that Mr Molepo as an expert in the field of real estate, who possessed skills in the property industry, was head-hunted by PRASA when he was working for ABSA Properties and the Board and Mr Montana employed him as CEO of Intersite. He submitted that Deloitte was appointed to investigate the alleged irregular and corrupt activities that were happening at PRASA CRES under the watch of Mr Molepo as the CEO and that Mr Molepo was placed on special leave during the investigation to prevent him from interfering with the investigation. The investigation concluded that Mr Molepo had failed in his duties as the CEO of PRASA CRES and interfered in the appointment of a company called Civils 2000, amongst other irregularities.

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- 6.27.4.31 Mr Montana did not provide me with supporting documents regarding Mr Molepo's appointment of Civils 2000. Mr Montana further submitted that the forensic report recommended that disciplinary action be instituted against the persons implicated including Mr Molepo. At the same time, Mr Molepo was failing to meet performance targets as well as the expectations of PRASA.
- 6.27.4.32 Mr Montana argued that he had a series of consultations with Mr Molepo to discuss his performance as well as the findings and recommendations made by the Deloitte Report and the parties agreed that Mr Molepo would be redeployed and redeployed as Special Advisor to Mr Montana on real estate matters and that the parties further agreed that Mr Molepo's redeployment would be on the same terms and benefits he enjoyed as CEO of PRASA CRES. Mr Montana argued that Mr Molepo decided to repudiate the agreement he had reached with him and chose not to come to work resulting in his dismissal.
- 6.27.4.33 This argument is contrary to the argument that Mr Montana made in his earlier response regarding the dismissal of Mr Molepo involving the appointment of ARUP. He argued that Mr Molepo was relieved of his duties and that the matter was before a court of law and that PRASA was not at liberty to disclose the records.
- 6.27.4.34 Mr Montana further stated that it was on that basis that Mr Molepo went to the CCMA and eventually the Labour Court and that it was clear that the allegation that Mr Molepo was unfairly dismissed was not true.



**Ms Liz Choonaira, Ms Claudia Williams and Mr Sisa Mtwana**

6.27.4.35 No response was received from PRASA with regard to the abovementioned Executives. However, in the absence of such evidence from PRASA, a reasonable inference to be drawn from PRASA’s silence in this regard and failure to provide supporting documents may seem to indicate that Complainant’s submission is probable. However, I could not conclude in the absence of evidence.

6.27.4.36 In his conclusion regarding this matter, Mr Montana argued that PRASA observed that the provisional findings around the issues of firing of Executives had a tendency of taking away the right of the PRASA GCEO to manage and discipline his Executive team members and that decisions regarding issues relating to settlements with Executives, were made in the best interest of the business.

6.27.4.37 The following were reflected as contingent liabilities in terms of labour disputes in PRASA’s Annual Reports on Financial Statements for the years ending 2009/10, 2010/11 and 2011/12:

Table: Contingent liability

No.	Year	Contingent liability-labour disputes	Amount
1.	2009	Labour disputes	375 000
2.	2010	Labour disputes	--
3.	2011	Labour disputes	7 746 000
4.	2012	Labour disputes	7 746 000

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6.27.4.38 The Auditor General indicated in Financial Statements for the year 2008/09, 2009/10, 2010/11 and 2011/12 reports that the fruitless and wasteful expenditure incurred by PRASA was in respect of interest on overdue creditors.

6.27.4.39 The issue whether the dismissal of executives was improper and whether it resulted in fruitless and wasteful expenditure, will be resolved when measuring the conduct of PRASA against the relevant rules in the following chapter as that is a legal determination.

**6.28 Complaint 28: Regarding the GCEO's alleged improper suspension of employees resulting in labour dispute settlements amounting to R3.35 million thus constituting fruitless and wasteful expenditure:**

6.28.1 Common cause

6.28.1.1 It is common cause that PRASA suspended employees during the period in issue and paid the salaries of the employees concerned.

6.28.2 Issues in dispute

6.28.1.2 Mr Montana denied that he unlawfully engaged yearly in a series of suspending employees perpetually with payment of salaries costing PRASA an estimated R 3, 35 million in fruitless and wasteful expenditure.

6.28.1.3 I have been provided by the Complainant with a memorandum dated 30 December 2012 prepared by Mr Silence Vilane, the then SATAWU Provincial Rail Secretary addressed to POBC. NOBC (*sic*), copied to Rail coordinators and

PRASA Management Forum entitled “SATAWU persecution cases by PRASA management” in respect of Gauteng Province.

6.28.1.4 The memorandum captures the list of members, shop stewards and managers in Gauteng Province that were allegedly persecuted by PRASA management. The details of the allegations are captured in the table below as follows:

**Table: Details of employees victimised by PRASA**

No.	Name	Allegation	Period of suspension	Estimated company loss
1.	Miss Siphokazi Ndaba	Alleged violation of procurement procedures and process	Suspended on 11/02/2010 and subsequently dismissed on 18 March 2011	R 364 000
2.	Mr Martin Hlongwane	Alleged Insubordination and insolence	Suspended on 23 November 2011, still on suspension	R 62 000
3.	Mr Sello Motaung	Corruption, violation of company policies, processes and procedures	Suspended on 1 October 2009; still on suspension	R 1 200 000
4.	Mr Frans Makgaba	Alleged theft of buses pending investigation on	Suspended on 13 July 2010	R 630 000

No.	Name	Allegation	Period of suspension	Estimated company loss
		whether proper procedures were put in place to prevent incidents		
5.	Ms Priscilla Selele	<p>Alleged gross dishonesty in failure to disclose incompetence;</p> <p>Alleged misrepresentation of school qualification</p> <p>Alleged gross dishonesty in misrepresenting a conversation between herself and the CEO on an email whereupon the CEO promised on several occasions to appoint the employee permanently as his PA</p>	Suspended on 6 October , still on suspension	R 126 000
6.	Mr Silence Vilane	Alleged sending of disrespectful email to Senior Manager, misuse of company computers by sending SATAWU documents within PRASA, misuse of	Suspended on 7 December 2011, still on suspension	R14 200

No.	Name	Allegation	Period of suspension	Estimated company loss
		X99 leave and desertion of post/duties		
7.	Miss Samela Sontshatsha and 27 others	PRASA's deliberate refusal to finalise the absorption of workers and allocation thereof to one department	Workers still employed by PRASA without an allocated department	No loss to company
8.	Mr M Zungu and 20 others	Alleged unprotected strike/illegal work stoppage	Workers issued with 12 months final written warnings on 25 July 2011	Lost working time
9.	Mr Gabriel Mabusa	Alleged disregard of train working rules whilst driving a train	Employee removed from duties on 24 June 2010 and reinstated on 1 September 2010	Lost working time
10	Mr Craig Nte	12 February 2010-Absenteeism, bringing company name into disrepute  Suspended on 03 May 2011-No reasons for suspension , nine charges levelled against the employee	Suspended in November 2004 until March 2006- There was a disciplinary hearing but no ruling, employee thereafter instructed to return to work.  Suspended on 12 February 2010 until June 2010-No	R 924 000

No.	Name	Allegation	Period of suspension	Estimated company loss
			charges, no hearing and no ruling, employee thereafter instructed to return to work  Suspended on 23 May 2011, still on suspension	

6.28.1.5 The details of the complaints are canvassed below as follows

**Miss Siphokazi Ndaba, PRASA Train Operations Manager: Procurement**

6.28.1.6 According to the memorandum, the employee was suspended on 11 February 2010 and was subsequently dismissed for alleged violation of company procedures and process on 18 March 2011. The memo further states that the intention of PRASA was to destroy functionality of SATAWU at PRASA through the management forum. It was further stated that: the company's disciplinary code and procedures required that disciplinary cases be finalised within 30 calendar days but PRASA does not complete disciplinary cases within that time frame; PRASA had to appoint a Manager to act in her position whilst she was on suspension; there was deliberate refusal of organisational rights as per the LRA; and the company loss was indicated as R 364 000.00.

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**Mr Martin Hlongwane, PRASA Area Manager, Customer Services**

6.28.1.7 According to the memorandum, Mr Martin Hlongwane (Mr Hlongwane) was ordered by PRASA management to leave his station, Johannesburg Park station and relocate to New Canada. It is alleged that the employee refused the transfer and was suspended on 23 November 2011 and was still on suspension on 30 December 2012. According to the memorandum, Mr Hlongwane was replaced by Mr Patrick Oliphant who was a station Manager at Daveyton. The monthly salary for Mr Martin Hlongwane was reflected as R 31 000.00 per month. It is further stated that Company policies and procedures were violated and as a result the Company lost R 62 000.00 in respect of the 2 months suspension.

**Mr Sello Motaung, PRASA Supply Chain Manager: Metro Park**

6.28.1.8 According to the memorandum, the company suspended the employee on 1 October 2009 and that the employee was still on suspension at the date of the memorandum. The memorandum further states a hearing with the external presiding officer (Commissioner) ruled that the employee be sanctioned to three month written warning. The memorandum further provides that PRASA has taken the matter for review at the Labour Court as it wanted to dismiss the employee.

6.28.1.9 The memorandum further indicates that the matter was still outstanding from the Labour Court and that the employee was still on suspension for a period of more than two years and as a result, the Company loss for the 2 years suspension was captured as R 1 200 000.00.

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**Mr Frans Makgaba, Senior Manager, Corporate Security**

6.28.1.10 According to the memorandum, Mr Frans Makgaba was suspended on 13 July 2010 after 2 disciplinary hearings. It is stated that alleges his suspension was withdrawn after 10 months and that the employee was redeployed back to Corporate Office. The case had not been finalised at date of the date of the compliant and the Company loss is indicated as R630 000.00 for a period of 10 months.

**Priscilla Selele, PA to CEO PRASA Rail**

6.28.1.11 According to the memorandum, the employee was appointed in the company position on a fixed term contract and accordingly the appointment violated the SATAWU/PRASA negotiation agreement.

6.28.1.12 The memorandum stated further that the employee was redeployed without the necessary transfer documents. On 5 October 2011, the CEO, Mr Moseneke put the employee on a special leave and further served with suspension letter on 6 October 2011.

6.28.1.13 The reasons for suspension were indicated as being the: alleged dishonesty in failure to disclose incompetence; alleged misrepresentation of school qualifications; and alleged dishonesty in misrepresenting a conversation between herself and the CEO on an email whereupon the CEO promised on several occasions to appoint the employee permanently as his PA and that seven disciplinary hearings were held against the employee.

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6.28.1.14 The company loss was indicated as R126 000.00, which is the period of suspension for 4 months.

**Mr Silence Vilane, Protection Official, PRASA Protection and Security Services Wits Region**

6.28.1.15 Mr Silence Vilane was suspended by his line Manager, Mr Thomas Mabasa, pending an investigation. The reasons for the suspension were indicated as the: allegations of sending disrespectful email to the National Department Manager, Mr Kabelo Mantsane; misusing PRASA computers by sending SATAWU documents; and retrieving SATAWU emails from PRASA intranet using PRASA computers; abuse of X99 leave in reporting an X99 leave and being seen at CCMA representing ex-PRASA employee; desertion of post and duties to attend SATAWU activities during working hours.

6.28.1.16 The company loss was indicated as R 14 100.00 which was in respect of 2 months suspension.

**Miss Samela Sontshatsha and 27 others, Platform Marshals under PRASA's Protection and Security Services Department**

6.28.1.17 According to the memorandum, Ms Sontshatsha and 27 PRASA Platform Marshal Trainees qualified through training to full Platform Marshals but were subsequently transferred to the Customer Services Department

6.28.1.18 The memorandum indicated that, SATAWU, through Patrick Oliphant and Silence Vilane, challenged the allocation of a department to these workers and the unfair transfer and unilateral amendment of the terms and conditions of employment of workers concerned. The memorandum further captured the fact that management

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opted for transferring these workers to another department in order to avoid confrontation with SATAWU.

6.28.1.19 No financial loss to PRASA was indicated in respect of the transfer.

**Mr M Zungu and 20 others, PRASA Train Operations Naledi, 7 Train Drivers and 14 Metro guards**

6.28.1.20 According to the memorandum, 21 employees were exposed to safety risk and hazards at their workplace, Naledi station and despite having made the relevant Line Manager and PRASA Management aware of the challenges, no action was taken to eliminate the risks. However, PRASA Management sanctioned employees with a 12 months final written warning for an alleged illegal work stoppage.

6.28.1.21 It is alleged that on the date of the memorandum, the risk situation at the Naledi depot had not been attended to.

**Mr Gabriel Mabusa, PRASA Train Driver, Acting Section Manager, Naledi**

6.28.1.22 Mr Gabriel Mabusa allegedly disregarded train working rules whilst on duty and was removed from his duties on 24 June 2010 but reinstated on 1 September 2010, and PRASA had to pay other train drivers overtime to cover the suspended employee's duty roster, thereby resulting in loss to the company through working time.

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**Mr Craig Nte, Area Manager, PRASA Protection and Security Services Wits Region**

- 6.28.1.23 According to the memorandum, Mr Craig Nte, Area Manager PRASA Protection and Security Services Wits Region was suspended from November 2004 to March 2006. A disciplinary hearing was conducted but no sanction was made and he was instructed to return to work.
- 6.28.1.24 The memorandum further states that the employee was further suspended on 12 February 2010 to June 2010 without any charges, hearing or ruling but the employee was thereafter instructed to return to work.
- 6.28.1.25 The employee was suspended again on 03 May 2011 and was dismissed on 17 January 2012 through a letter of termination of employment contract signed by Mr RM Khumalo the Acting Provincial Manager, which stated that after countless failed attempts to give Mr Nte an opportunity to challenge the evidence to be presented by management and state his case, a decision to terminate his employment contract with immediate effect was taken. PRASA appointed another Manager to act in the employee's position during the suspension period of the employee and the company loss was indicated as R924 000.00 being the salary for 29 months.
- 6.28.1.26 In his response received on 29 August 2013, Mr Montana argued that PRASA is a 16 000 strong employee organisation and that as is normal with any business of PRASA's size, employees face disciplinary hearings that may even result in termination of employment. In this regard Mr Montana submitted that employees are disciplined by their immediate supervisors in accordance with the Disciplinary Code of the company and each employee can appeal the fairness of a disciplinary process and its outcome and that they can also take any PRASA decision on

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review with the CCMA or Labour Court in line with the provision of the Labour Relations Act.

- 6.28.1.27 Mr Montana accordingly denied that he unlawfully engages in the unlawful suspensions of any of its employees thereby resulting in fruitless and wasteful expenditure.
- 6.28.1.28 I was not provided with documents by Mr Montana to substantiate his contention and Mr Montana did not dispute the allegations as stated above and in the memorandum of 30 December 2012.
- 6.28.1.29 Furthermore, in his response to the notice in terms of section 7(9) of the Public Protector Act, 1994, Mr Montana argues that no evidence was provided to support the claim that all employees who had been fired by PRASA were victimised. Furthermore, Mr Montana argues that the information in the Provisional Report have failed to take into account that PRASA as a public entity employs over 18 000 employees who report to different supervisors within different divisions of the organisation and therefore employees are normally disciplined or suspended and eventually dismissed for different types of misconduct and that the GCEO of PRASA is not involved in disciplining employees other than General Managers and Group Executives.
- 6.28.1.30 Mr Montana argued further that PRASA has a structure that includes five CEOs, Regional Managers and immediate supervisors who are responsible for employment, disciplining and where appropriate, dismissal of employees. Any action against the employees would be taken at that level and not by the GCEO as alleged in the complaint. Mr Montana however acceded that most of the employees were not disciplined within 30 day period as required by PRASA's Disciplinary Code. In this regard, Mr Montana indicated that PRASA would ensure

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that there is effective implementation of the Disciplinary Code to avoid wasteful and unauthorised expenditure.

6.28.1.31 The issue whether or not the suspension of employees of PRASA complied with the Disciplinary Code and relevant legal prescripts and whether or not the expenditure resulting from such suspensions amount to fruitless and wasteful expenditure, will further be resolved when measuring the conduct of PRASA against the relevant rules in the following chapter as that is a legal determination.

**6.29 Complaint 29: Regarding PRASA's Board Chairman, Mr Sfiso Buthelezi's alleged failure to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory services to PRASA on the Rolling Stock Programme:**

6.29.1 Common cause

6.29.1.1 It is common cause that Mr Sfiso Buthelezi was the Chairman of PRASA Board and the Chief Executive Officer of Makana, a subsidiary of Cadiz during the relevant time of the complaint.

6.29.2 Issues in dispute

6.29.2.1 The issue for my determination was whether or no Mr Buthelazi failed to disclose and manage a conflict of interest arisind from Makana, a subsidiary of Cadiz.

6.29.2.2 In its response received on 29 August 2013, PRASA denied that Cadiz was rendering Advisory Service to PRASA on the Rolling Stock Programme as alleged

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by Complainant and further denied that Mr. Sfiso Buthelezi failed to disclose and manage his conflict of interest in that regard. PRASA argued in this regard that it started the Rolling Stock Fleet Renewal Programme with the appointment of a consultancy to perform a feasibility study. The consortium was led by KPMG assisted by Interfleet and Edward Nathan Sonnenberg.

- 6.29.2.3 PRASA further submitted that it appointed Transactional Advisors for its new Rolling Stock Renewal Programme through a proper and transparent tender process and that Cadaz was not in any way one of the companies appointed by PRASA for the Rolling Stock Fleet Renewal Programme. PRASA indicated that companies in their various capacities appointed to the Project were: Interfleet Technologies; KPMG; LETSEMA; Weber Wentzel; Ledwaba Mazwai Attorneys; Vela VKE; and Arcus Gibb.
- 6.29.2.4 PRASA argued that the allegation that Cadiz is providing advice on the new Rolling Stock Project is not only false but also dangerous as it jeopardise an important process in the upgrading of passenger rail services and the creation of job opportunities within South Africa.
- 6.29.2.5 PRASA submitted that it finally announced the Gibela Consortium as the preferred bidder for the main Rolling Stock Fleet Renewal Programme and that, for the record, the Chairman of the PRASA Board is a Senior Executive at Makana Investment Corporation, which is owned by the Makana Trust, which belongs to former political prisoners in South Africa. Makana Trust has a stake in Cadiz Holding which is not involved in the PRASA Rolling Stock Fleet Renewal Programme.

6.29.2.6 In support of its contention, PRASA provided the declaration of interest of Mr Sfiso Buthelezi and the letter of his appointment as PRASA Board member dated 8 May 2011 from Mr S Ndebele (MP), Minister of Transport to Mr Sfiso Buthelezi which indicates the appointment of Mr. Buthelezi as Board Member of PRASA.

6.29.2.7 In terms of the "*DECLARATION OF INTEREST SUBMITTED BY N.S BUTHELEZI*". Mr. Buthelezi's disclosure of interest is provided as follows:

Company registration no	Name of company	Capacity	Nature and extent of interest
1997/007258/06	Cadaz Holdings		Shareholder
1997/011411/07	Makana Investment Cooperation	Director	Shareholder

6.29.2.8 I have not been provided with the disclosure documents to verify Mr. Montana's assertion that there has been proper disclosure and management of conflict of interest.

**6.30 Complaint 30: Regarding Dr Bridgette Gasa's, a PRASA Board member's alleged failure to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company providing consultancy services to PRASA:**

6.30.1 Common cause

6.30.1.1 It is common cause that Dr Bridgette Gasa was a member of the PRASA Board and also a Director of ARUP during 2011.

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6.30.2 Issues in dispute

6.30.2.1 The issue for my determination was whether or not Dr Gasas failed to disclose and manage a conflict of interest arising from her Directorship at ARUP.

6.30.2.2 In its response received on 29 August 2013, PRASA denied that Dr Bridgette Gasas (Dr Gasas), a former PRASA Board member failure to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company, providing consultancy services to PRASA. In this regard PRASA argued that PRASA has standing Good Practice Governance protocols, including declaration by PRASA Board Members and Executives in meetings where decisions are to be made. PRASA argued further that the agreement between PRASA and ARUP was entered into before Dr Gasas's appointment as a Director of ARUP.

6.30.2.3 PRASA, in support of its contention, provided the appointment letter of Dr Gasas dated 8 May 2011 from Mr S Ndebele (MP), Minister of Transport to Dr Gasas and the declaration of interest forms that she completed. The letter concerned stated among others that:

*"I am pleased to inform you that you have been re-appointed as a non-executive member to the PRASA Board of PRASA. The appointment is for the period of three (3) years with effect from 1 April 2011."*

6.30.2.4 In terms of the PRASA Director's disclosure of interest, other directorship and interest in contracts questionnaire, Dr Gasas's declaration of interest is captured as follows:

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1. *Are you a director of any other company?*
    - a) *"Elilox Group (Pty) Ltd {own company with 51% shareholdership}*
    - b) *NMC Construction Pty Ltd*
    - c) *Umso Construction Pty Ltd"*
  
  2. *Are you a member of any close corporation? – "Not at all"*
  
  3. *Are you involved in any partnership or trust, or are you involved in any other business of whatever nature? – "The Gasas Family Trust Fund as its Trustee"*
  
  4. *Do you own shares in any other company, other than investments on the JSE Securities Exchange?– "Not at all."*
  
  5. *Do you own shares in a company, including JSE investments which has or may in the foreseeable future acquire an interest in any contract with the corporation?*

*"I own shares in 27 companies listed in JSE and none of them have interests related to PRASA. Most of them are in the Mineral resource sector."*
  
  6. *Other than in point 5 above, do you have a material interest whether directly or indirectly, in any contract with the corporation, whether current or to be entered into? – "Not at all."*
  
  7. *Have you or will you be benefiting materially, either directly or indirectly, from any contract entered into with the corporation or any other contract related thereto? – "Not at all".*

6.30.2.5 Dr Gasas denied in her response dated 25 July 2015 that she was a director at ARUP since 2010 and that she had failed to disclose and manage a conflict of

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interest arising from her appointment to the Board while two companies she had an interest in provided services to PRASA. In this regard, Dr Gasa provided records that confirm that she was indeed a Director at ARUP from 9 February 2011 and that she made the necessary disclosures to PRASA on 20 July 2011. According to evidence received, ARUP SA (Pty) Ltd was indeed awarded a contract by PRASA for the Park Station Development Framework, however the contract was for R3.8 million which would not have required Board approval.

6.30.2.6 I have reviewed the agreement of appointment of Dr Gasa to Directorship of ARUP and noted that Dr Gasa was appointed on 9 February 2011 as Non-Executive Director of ARUP.

**6.31 Complaint 31: Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, the wife of former PRASA Board Member, Mr. Bushy Boshielo, as the General Manager of Autopax:**

6.31.1 Common cause

6.31.1.1 It is common cause that Ms Boshielo, the wife of the erstwhile member of the PRASA Board, Mr. Bushy Boshielo, was appointed as an Executive Manager Business Development at Autopax on 3 May 2010.

6.31.1.2 It is also common cause at the time of the appointment of Ms Boshielo, Mr Boshielo at time was a PRASA Board member.

6.31.2 Issues in dispute

6.31.2.1 The issue in dispute was whether the appointment of Ms Boshielo was done in line with PRASA's Recruitment and Selection Policy.

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6.31.2.2 A response from PRASA which was received on 29 August 2013 regarding this particular allegation was that:

- a) Ms Boshielo was appointed at Autopax, a wholly owned subsidiary of PRASA in terms of their own recruitment process. Ms Boshielo is in her own right an experienced Public Transport Practitioner, who was employed by the Department of Roads and Transport in Limpopo.
- b) The Recruitment Policy provides for the headhunting of suitably qualified and experienced candidates as long as this is approved by the GCEO of PRASA.
- c) Ms Boshielo was appointed by the PRASA Board of Autopax, a subsidiary of PRASA and her appointment is in line with the provisions of the PRASA Recruitment Policy.
- d) The allegation that the recruitment and appointment of Mrs Boshielo was influenced by any member of the PRASA Board is denied.

6.31.2.3 PRASA GCEO in support of his response provided us with the Job advertisement and email correspondences.

6.31.2.4 The copy of the advertisement shows that the position was advertised in the Sunday Times of 29<sup>th</sup> November 2009.

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6.31.2.5 According to the document untitled "Autopax Job specification", the following information was reflected:

- Job title: Executive Manager Business Development
- Department: CEO
- Closing Date: 7 December 2009
- As per the Employment Equity Plan this position was earmarked for African or coloured female.

6.31.2.6 According to an e-mail dated 30 November 2009 from Ms. Polly Boshielo to "recruitment@apx.co.za" (copied "bopapem@telkomsa.net)

6.31.2.7 The e-mail indicates that the application form and CV was attached and forwarded to Autopax.

6.31.2.8 A copy of an application letter dated 30 November 2009 from Ms Boshielo to Executive Director: HR Autopax Passenger Services (Pty) (Ltd) titled "Application for an advertised post: of Executive Manager: Business Development

*"I, Shela Paulina Polly Boshielo hereby apply for a post of Executive Manager: Business Development as advertised in the Sunday Times of 29<sup>th</sup> November 2009"*

6.31.2.9 According to an e-mail dated 15 April 2010 from Mr. Johannes Matheko, Autopax Passenger Services (Pty) (Ltd), Executive Manager Human Resource, to [pollyboshiela@yahoo.com](mailto:pollyboshiela@yahoo.com) titled Business Development Executive:

*"We refer to the interview held on the 6 April 2010 and wish to inform you were successful in your application. In view of the aforesaid, Autopax will like to make you an offer for employment. Kindly find attached for your perusal and consideration."*

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6.31.2.10 A letter of appointment dated 15 April 2010 addressed to Ms Boshielo signed by S Zamxaka (Chief Executive Officer), Autopax Passenger Services (Pty) (Ltd). According to the letter, Ms Boshielo was appointed as Executive Manager Business Development at Autopax Passenger Services (Pty) (Ltd) with effect from 3 May 2010. A letter of appointment indicates that the acceptance letter was signed on 3 May 2010.

6.31.2.11 Paragraph 9 (Head Hunting) of the PRASA Recruitment and Selection Policy dated 1 December 2008 states

*"The Group Chief Executive Officer has the authority to head hunt, and/or mandate the Human Resource Department to head hunt candidates with appropriate skills knowledge and experience necessary to meet the requirements of the business"*

6.31.2.12 While in the initial response Mr Montana maintained that Ms Boshielo was appointed through headhunting, in response to my provisional findings he changed the tune to state that PRASA's initial submission was made in error as Ms Boshielo was appointed through a recruitment and selection process and was selected from amongst other candidates. However, PRASA failed to provide me with recruitment documents to substantiate their assertion.

6.31.2.13 Except for the job advertisement, the employment offer and the acceptance letter, PRASA failed to provide me with recruitment memoranda in respect of the headhunting and/or recruitment process followed in the appointment of Ms Boshielo.

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**6.32 Complaint 32: Regarding the alleged irregular appointment of Mr Joel Chimanda as PRASA's special advisor at a cost of R 2 million:**

6.32.1 Common cause

6.32.1.1 It is common cause that Mr Joel Chimanda was appointed as a Special Advisor during 2008/2009 at PRASA's cost of R2 million.

6.32.2 Issues in dispute

6.32.2.1 The issue in dispute was whether the appointment of Mr Chimanda was in line with the PRASA's Recruitment and Selection Policy.

6.32.2.2 A response from PRASA which was received on 29 August 2013 regarding this particular allegation was that:

- a) The Financial Advisor was appointed as a result of his experience in Business Strategy and Financial skills. It is the prerogative of the GCEO to appoint within his office, Special Advisors with suitable skills from time to time as required by the business, and
- b) Accordingly, the appointment of Special Advisors to the GCEO does not follow the same recruitment procedure of Executives and other employees as provided for in the Recruitment Policy of PRASA nor a tender process in the appointment of consultants and other professional services.

6.32.2.3 Mr Montana in support of his response provided us with the contract between PRASA and Mr Joel Chimanda.

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6.32.2.4 According to a Professional Services contract entered between South African Rail Commuter Corporation Ltd (SARCC) and AR Chimanda Consulting trading as JC Consulting dated 26 February 2009 the contract provides the following:

**“Clause 3 Commencement and termination**

*This agreement shall notwithstanding the date of signature, commence 27 October 2008 (hereinafter referred to as the commencement date) and shall continue until 31 July 2009 unless terminated earlier as provided for in this agreement*

**Clause 4 Scope of work**

*Scope of Mandate to advise SARCC CEO’s office and PRASA Board to develop a plan that will be used by Passenger Rail Agency of South Africa:*

*The overall scope of this mandate is broken down into four broad “business plan input” workflows: whose details are attached hereto marked JC1.*

- *Corporate Governance Structure, Legal, Operating and Reporting Line;*
- *Develop such plan that will guide CEO office, manage and monitor merger and integration SARCC, Metrorail, Shosholozza Meyl, Autopax and Intersite;*
- *PRASA proposed Capital Structure and Pro-forma Balance Sheet;*
- *SARCC Capex and Special Projects that impact PRASA Strategic initiatives in a proposed Strategic Asset Management Function*

...

**Clause 6 Price Structure and Payment**

- *The total value of the contract is R1 995 750 (excluding VAT) which will with effect from 1 March 2009 be paid on a monthly retainer of R 150 000.00 on date of every month.*

- *The Contractor shall be entitled on a monthly basis. To submit the timesheet to CEO office.(sic)*

...

**Clause 10 Price Structure and Payment**

*This agreement, and the proposal submitted by the Contractor to the Client on or about 27 October 2008 constitutes the whole agreement between the parties as to the subject matter thereon and no agreements; representations or warranties between the parties other than those set out herein or in such proposal are binding on parties."*

- 6.32.2.5 I have observed that PRASA appointed AR Chimanda Consulting for advisory services and did not appoint Mr Joel Chimanda as an employee. As such the applicable instrument to measure PRASA's conduct is the PRASA SCM Policy and not its Recruitment and Selection Policy.
- 6.32.2.6 I have found that the appointment of AR Chimanda Consulting was not preceded by a competitive bidding process in compliance with the provisions of PRASA SCM Policy.

**6.33 Complaint 33: Regarding PRASA's alleged improper replacement of the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa without following proper recruitment process:**

6.33.1 Common cause

- 6.33.1.1 It is common cause the Mr Mphefo Ramutloa was appointed as the Group Executive HR by PRASA.

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6.33.2 Issues in dispute

- 6.33.2.1 The issue in dispute was whether the appointment of Mr Ramutloa was in line with PRASA's Recruitment and Selection Policy.
- 6.33.2.2 It is also in dispute whether or not Mr Ramutloa is Mr Montana's uncle.
- 6.33.2.3 In Mr Montana's response to the section 7(9) notice, he provided documentation which indicates that the position of Group Executive HR was advertised internally on 11 November 2010. Two applications were received and one was from Mr Ramutloa dated 22 November 2010.
- 6.33.2.4 PRASA conducted interviews on 25 November 2010 whereupon Mr Ramutloa was recommended for appointment.
- 6.33.2.5 Mr Montana and Mr Ramutloa both denied the existence of relationship between them.

**6.34 Complaint 34: Regarding PRASA's alleged failure to deal with staff members who were involved in fraudulent Electronic Funds Transfers:**

6.34.1 Common cause

- 6.34.1.1 It is common cause that PRASA lost R8.1 million in 2010 through unlawful Electronic Funds Transfer from their Metrorail Durban and Tshwane regions bank accounts.

6.34.2 Issues in dispute

- 6.34.2.1 The issue for my determination is whether or not PRASA failed to take disciplinary action against employees who were allegedly involved in the loss of the money.

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6.34.2.2 In its response received on 29 August 2013 regarding this particular allegation PRASA stated that:

- a) Management uncovered the fraudulent Electronic Funds Transfers in the Durban and Tshwane regions of Metrorail. Management reported the criminal acts to the SAPS, recovered some of the stolen funds and instituted a forensic investigation.
- b) Management terminated PRASA's banking relationship with Standard Bank after it felt that the bank did not do enough to protect PRASA and that it was not affording due attention to the investigation.
- c) The Audit and Risk Committee of the PRASA Board and Management took appropriate action and reviewed the controls governing the transfer of funds from PRASA bank accounts.
- d) PRASA has raised concerns that the criminal investigations have not been concluded so that those involved in this crime are brought to book.

6.34.2.3 Mr Montana in support of his response provided us with the Deloitte Report dated 26 February 2010.

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6.34.2.4 According to the Deloitte Report the following transpired:

*"Executive summary (enter alia)*

*Two incident of EFT fraud took place at the Durban and Tshwane Regional offices during June and July*

*Approximately R 4 million was fraudulently transferred on each occasion. The total loss at the date of Deloitte report was R 4 710 658.45 as R 3,463 456.44 had been preserved by the respective banks*

*The fraudulent EFT transactions were perpetrated via 369 beneficiary bank accounts. The Nature of the fraud perpetrated in Durban and Tshwane Regions was of a sophisticated and complex level. The possible involvement of more than one crime syndicate and collusion between Prasa staff and external parties are likely*

*Description of the Fraud*

*Durban*

*According to the business online logs from Standard bank, the unauthorised access was initiated after 21h00 on Friday 13 June and continued to run over the long weekend. The access only terminated on Tuesday 18 June at approximately 09h38*

*As a result of hacking, electronic payments totalling to R 4 167 012 were deposited into 180 beneficiary bank accounts mainly held with South African's top 4 bank .*

*The respective banks froze the beneficiary accounts when they were alerted to the fraud and as a result an amount of R1 681 169 was preserved. At the date of the report, Metrorail had recovered R1 679 303. Therefore the total loss by Metrorail in respect of the Durban Fraud was R2, 487 709*

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*Tshwane Region*

*A second fraud was perpetrated just a month later at Metrorail, Tshwane. According to the business Online logs from Standard, the unauthorised access was initiated on Wednesday 9 July 2008 at approximately and again after 22h00. Unauthorised access was gained for the second time on 10 July 2008 after 22h00. There was further unauthorised access on Friday 11 July after 12h00 and again after 18h00, thereafter the access continued to run over all hours of the weekend. The access only terminated on Monday, the 12 July at approximately 03h20. As a result banks froze the beneficiary accounts when they were alerted to the fraud and as result an amount of R1 782 287 had been preserved."*

- 6.34.2.5 Clause 13.2 of the Deloitte report dealing with Negligence of Employees stated the following:

*"Metrorail should consider whether the employees who became aware of the looming Tshwane Fraud on Friday 11 July 2008, as well as those in Durban who did not implement any procedures to mitigate the company's risk immediately on discovery of the unknown transactions when appeared on the CATS system on the afternoon of 17 June 2008, should be disciplined for not preventing additional losses."*

- 6.34.2.6 Section 13.3 deals with possible disciplinary action: contravention of Metrorail's computer policy.

- 6.34.2.7 The following contraventions of the information and Communication Technology: Password Policy, have been identified:

*"Clause 5.4.2 Difficult to Guess Passwords Required: Mr Ngobeni indicated that he made use of a simple or generic password and that someone may have been able to identify it while watching the key PRASA Board as it is typed"*

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*Clause 5.8.4 Passwords Must Never be written down: Both Mr Chetty and Ms Pillay acknowledged that they wrote down their Business Online usernames and password in their diaries*

*Clause 5.8.5 Password Sharing Prohibition: Ms Gcabashe disclosed her username and password to Mr Mabaso to enable him to use her computer when she was not at her desk. This placed Metrorail at risk, especially in view of the fact that Ms Gcabashe has the rights of an IT administration, which involves the authority to access all Metrorail computers.*

*Clause 5.8.5 Password Sharing Prohibition: Mr Ngobeni disclosed his CATS password to Ms Palliyiah telephonically while he was on leave. This action poses the very serious risk to Metrorail as it means that a single user could perform more than one function on CATS.*

*The report also indicates that the following case number:*

*CAS number: Durban Central CAS 1175/06/2008*

*CAS number: Tshwane Central CAS 631/09/2008*

#### *Executive Summary*

*According to Mr Sibeko, some two weeks prior to the fraud in Tshwane (around 11 July 2008), he was approached by members of the crime syndicate. They requested him to assist in the execution of fraud.*

*Around the 26th and 27 June 2008, Mr Sibeko, received a telephone call from a man called "John". At the time Mr Sibeko was selling computers in his own personal capacity. John initially contacted him to enquire in this regard. John*

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*subsequently contacted Mr Sibeko and met with him, outside his flat in Paul Kruger Street. At the meeting, John explained that he was from Durban, he had obtained money from Metrorail CATS system in Durban and that he required the passwords of the people working on the system in Tshwane.*

*Mr Sibeko approached "Benny" at Protection Services and he was subsequently directed to Mr Kabelo Mantsane (Mr Mantsane), the Head of Protection Services. Mr Sibeko explained the events to Mr Mantsane. Mr Mantsane confirmed that there was a fraud case being investigated in Durban and required additional information. He suggested that Mr Sibeko should meet with John, should he make further contact with Mr Sibeko.*

*Later that week, Mr Sibeko was contacted again and another meeting was requested with John. Mr Sibeko informed Mr Mantsane of the new development and later told him to meet with John and to obtain as much information as possible. Mr Sibeko met with three men in Greenfield in Hatfield, at the meeting, the men explained to Mr Sibeko what they did in Durban. They had a spy software (spyware) which was plugged onto a network or anywhere on a computer that will provide the information they require. They wanted Mr Sibeko to place the spyware for them in order to obtain the passwords they needed. Mr Sibeko told them that he first needed to see the spyware in order to decide on whether he would be able to use it. The men initially offered Mr Sibeko R 150 000 if he successfully secured the passwords.*

*A day or two later after the meeting, Mr Sibeko reverted to Mr Mantsane, and provided him feedback. According to Mr Sibeko, Mr Mantsane informed him that he was working on a plan and that he wanted someone trustworthy from the Police to help with the case.*

*Mr Sibeko later had a third meeting with the men. He wanted to certain how the spyware worked and took his official laptop with him. Mr Sibeko handed his laptop to the men and they proceeded to try to install the software. The software was*

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*contained on something that looked like a Sony Play Station 2 (PS2) adaptor and the device fitted into one of the ports on the computer. However, the anti-virus software on Mr Sibeko's computer detected the intrusion and the installation was automatically aborted.*

*The following day Mr Sibeko met with Mr Mantsane at a hotel opposite the Union building. He explained to him exactly what had happened and that the software would not work because of the antivirus program.*

*Approximately a week later, the men contacted Mr Sibeko again and requested another meeting. They informed him that they had secured the new spyware and wanted to continue with a plan. Mr Sibeko tried to contact Mr Mantsane to provide him with update, but could not get hold of them. Mr Sibeko undertook to meet with the men, but he tried to delay them for 2 to 3 days by not taking their call, as Mr Mantsane informed him that he was waiting for someone from the police to assist. He further met them a couple of times. The men subsequently increased their offer of R 150 000 to R200 000 for Mr Sibeko's assistance.*

*The criminal case relating to the Tshwane incident was only opened on 13 September 2008, whereas the Fraud incident occurred in Mid-July. Prior to the case being opened, two suspects were arrested in Durban. These suspects were arrested in Durban. These suspects were arrested when they presented themselves as account holders wanting to make withdrawals from the beneficiary bank accounts used to perpetrate the Tshwane fraud. These suspects were subsequently released as the criminal case relating to the Tshwane incident was not opened at the time*

*During the interview with Mr Mantsane, he acknowledged that the police case for the Tshwane fraud was opened late. Mr Mantsane was of the impression that the case was opened late. Mr Mantsane was of the impression that the case would be opened by Standard Bank. Contrary to Mr Mantsane's statement, the Standard*

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*Bank report compiled by the forensic team urged Metrorail to open a police case in respect of the Tshwane fraud.*

*It was pointed out on the report that there is a reporting obligation on PRASA to report the commission of such crime to a police officer in terms of Prevention and Combating of Corrupt activities Act, No 12 of 2004. Section 34 of the said Act stipulates that "Any person in a position of authority who knows or ought reasonably to have known or suspected that another person has committed corruption, the offences of theft, fraud extortion, forgery or uttering of a forged document, involving R100 000 or more, must report such knowledge or suspicion or cause same to be reported to the police official.*

*Mr Sibeko was aware of the looming threat of fraud for approximately 2 weeks prior to the event taking place. He could not provide us with an explanation as to why the bank account was not closed during the Friday of the first week.*

*According to Mr Piet Pieterse of the Scorpions, the matter was only reported to him subsequent to the occurrence of the Tshwane Fraud.*

*(Mr Sibeko had various meetings with members of the syndicate without a backup from the Law-enforcement agencies)*

*According to Mr Sallie, anyone at Metrorail and not necessarily a bank designated person could have reported the fraud treat to Standard Bank and requested that the accounts be shut down accordingly. The duty would then be on Standard Bank to take the necessary precautions, However Mr Mantsane, Mr Kekana and Ms Matloga did not make an attempt to contact Standard Bank on that Friday Afternoon."*

- 6.34.2.8 A copy of a warning letter in respect of Ms Kumarie Pallaiyiah, only signed by the manager (only the signature can't see the name of a person), the letter was signed on 9 June 2010.

*"Nature of offence*

*Failure to comply to clause 3 (Password Administration) of the Metrorail Network Policy, when by your admission, you requested your subordinate, whilst he away on annual leave, to disclose his CATS password to you for you to process payments on the system on his profile, even though he was not at work on the day in question"*

*Action Taken*

*It has been decided to issue you a Final Written Warning valid for 12 months effective date of signature."*

6.34.2.9 A grievance document by Ms Kumarie Pallaiyiah, Assistant Manager was provided to the investigation team. In the grievance, Ms Pallaiyiah expressed unhappiness about the final written warning that was issued to her on 09 June 2010 after the Deloitte Report. She appealed for her final written warning to be withdrawn and that formal charges be brought against her to enable her to defend herself.

6.34.2.10 According to the Director's section in paragraph 3.1(iii) of the 2008/09 PRASA Annual Report:

*"Fraudulent banking transactions were processed in the Metrorail Durban and Tshwane regions in June 2008 and July 2008 respectively. These transactions were processed through the Standard Bank Business Online Electronic system, which the regions use to pay suppliers. The system's security access controls were breached to process the fraudulent transactions.*

*A total amount of R 8.1 million was withdrawn from the region's bank account and paid into fictitious bank accounts created by fraudster(s). The matter was reported to Standard Bank and the South African Police Service for investigation.*

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*In addition, Deloitte Forensics has been engaged to carry out a more detailed forensics investigation and make recommendations on areas that might still need improvement. The investigation is on-going.*

*To date, Standard bank has recovered R 2.4 million. The balance of the loss has been accounted for in the Financial Statements under review and an insurance claim accordingly.*

*To prevent recurrence of this nature, Management has implemented stringent internal control measures around electronic banking which include, amongst others, removing the ability to create new vendors/creditors from the regions, more frequent changing of passwords as well as enhancing and enforcing of the segregation of duties.*

*The Audit and Risk Management Committee and the PRASA Board are being appraised of progress and developments in this matter."*

- 6.34.2.11 From the evidence provided to me, disciplinary action was taken against only one of the six (6) employees found responsible by a Deloitte forensic investigation, for security lapses that led to the fraudulent Electronic Funds Transfer of funds from their KwaZulu Natal and Gauteng bank accounts.

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6.34.2.12 PRASA took action against Ms Pallaiyah but inexplicably failed to take disciplinary action against the other five individuals recommended for possible disciplinary as mentioned in paragraph 13.3 of the Deloitte Report of 26 February 2010, to wit:

1. Mr Ngobeni;
2. Mr Chetty;
3. Ms Pillay;
4. Ms Gcabashe; and
5. Mr Mabaso.

**6.35 Complaint 35: Regarding GCEO's alleged improper Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000.00 and did such amount to fruitless and wasteful expenditure:**

6.35.1 Common cause

6.35.1.1 It is common cause that Mr Montana undertook a Blue Train trip to Cape Town during the period 24 to 27 September 2009.

6.35.2 Issues in dispute

6.35.2.1 The issue for my determination was whether or not Mr Montana undertook a Blue Train trip with ten female companions to Cape Town resulting in fruitless and wasteful expenditure.

6.35.2.2 In his response received on 29 August 2013, Mr Montana stated that regarding this particular allegation was that 3 PRASA Executives Engineers embarked on an

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operation inspection of the Blue Train for the purpose of assessing its operations on 25 of April 2011. This date does not correlate with the date alleged by the Complainant and therefore the response in this regard is not relevant to the issue. No evidence relating to PRASA's contention was provided.

6.35.2.3 Mr Montana argued that PRASA uses an electronic diary and at the commencement of everyday calendar year, these electronic diaries automatically delete entries of the preceding years and therefore could not provide same, as the information was already deleted.

6.35.3 Evidence obtained from SAA and the Complainant

6.35.3.1 The evidence reveals that the trip of September 2009 was arranged by the office of the GCEO using PRASA's official travel agency.

6.35.3.2 However, the evidence obtained from SAA indicates that the travelling costs in respect of the persons referred to by the Complainant, was paid for in cash.

6.35.3.3 The Complainant provided photographs taken between 24 and 27 September 2009. Documents received from SAA and photographs received from the Complainant suggest that Mr Montana travelled on 24 September 2009 in the same train with the following persons:

- a) Ms Patience Dlamini;
- b) Ms Dorothy Letsoalo ;
- c) Maggie Mopedi;

- 
- d) Karabo Nosilela; and
  - e) Gwendoline Thabane.

6.35.3.4 However, I have not been provided with convincing evidence to conclude that Complainant's allegation is corroborated and proved. In the absence of such evidence, I am inclined to afford Mr Montana the benefit of doubt.

**6.36 Complaint 36: Regarding PRASA's alleged improper payment of salaries to Mr Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure, and did PRASA's GCEO in relation thereto mislead the Exco and the PRASA Board:**

6.36.1 Common cause

6.36.1.1 It is common cause that Mr Pule Mabe, former Executive Corporate Affairs Manager of the SARCC left its service during 2009.

6.36.2 Issues in dispute

6.36.2.1 Mr Montana denied that PRASA paid salaries to Mr Mabe after he resigned despite having left its service and that he misled EXCO and the PRASA Board that the employee was not on PRASA's payroll but its predecessor, the SARCC.

6.36.2.2 No information relating to payment of salaries in respect of Mr Mabe was provided by PRASA.

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**6.37 Complaint 37: Regarding Mr Montana's alleged improper transferring of Mr Stephen Ngobeni without disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability thereby amounting to maladministration:**

6.37.1 Common cause

6.37.1.1 It is common cause that Mr Stephen Ngobeni was in the employment of PRASA (formerly Cape Metrorail) since 1988.

6.37.2 Issues in dispute

6.37.2.1 The issue for my determination was whether or not Mr Ngobeni was improperly transferred without disciplinary processes being followed and whether Mr Ngobeni is related to Mr Montana.

6.37.2.2 PRASA denied in their response dated 29 August 2013, that Mr Stephen Ngobeni was improperly transferred without disciplinary process being followed for his alleged appointment of a Training Contractor to provide training services on the handling of People with Disability. PRASA provided in support of its contention the employment files of Mr Ngobeni containing among others his history of his employment with the organisation since the time of Metrorail.

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- 6.37.2.3 In its response received on 13 March 2013, PRASA submitted that Mr Ngobeni was appointed in the security department of Cape Metrorail in 1988 and worked through the ranks to become head of security, head of operations and was eventually the Regional Manager of Cape Metrorail.
- 6.37.2.4 Documents supporting this contention supplied by PRASA were reviewed and it was noted as confirming the submission by PRASA in this regard. According to PRASA's contention, Mr Ngobeni was demoted and transferred after his handling of a labour dispute that resulted in a strike and loss of assets.
- 6.37.2.5 It was contended that Mr Montana joined the rail utility only in July 2006, eight years after Mr Ngobeni was appointed by Metrorail in Cape Town and Mr Montana accordingly rejected the allegation that Mr Ngobeni is his cousin. I have also not discovered any evidence during the course of the investigation which proves this allegation and in the absence of such evidence I am inclined to conclude that no such relationship exists.
- 6.37.2.6 I have also not discovered evidence to prove that Mr Ngobeni was transferred without disciplinary action being taken against him for the appointment of a Training Contractor as alleged by the Complainants.

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## 7. MEASURING CONDUCT AGAINST THE RULES

### 7.1 Regarding the alleged irregular awarding of a tender for the installation of high speed passenger gates worth R800 million to a certain contractor in 2009/2010 for the Doornfontein station which was later improperly extended to other stations nationally:

7.1.1 Having concluded that the PRASA Board extended the scope of the tender awarded to Siyangena Technologies for the supply and installation of high speed passenger gates at Doornfontein and Nasrec stations to other stations nationally, the matter to be adjudicated was whether or not PRASA's conduct in extending the said contract was in contravention of its SCM Policy and applicable national prescripts.

7.1.2 To arrive at a fair answer I had to test PRASA's manner in which the widening of the scope of high speed passenger gates tender was implemented with the requirements of allowing closed tenders.

7.1.3 Had the award been made in response to an emergency as alleged in one of the PRASA versions, the provisions of paragraph 11.3.5 of PRASA SCM Policy would have applied. Although the provisions of this paragraph appear to confine emergency situations to disasters (e.g. damage from cyclones, floods, fire, etc.), systems failures and security risk, it could have been legitimately accepted that not having the high speed passenger gates could pose a risk.

7.1.4 However, having concluded that the submission that the extension was 4 months before the FIFA World Cup in June-July 2010, was untrue, the emergency, I could use the requirements under emergency provisions to assess whether the manner

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in which the extension of the scope for Siyangena's tender complied with such requirements.

7.1.5 The compliance framework I considered appropriate was paragraph 11.3.2 of PRASA SCM Policy regulating general procurement to embark on a competitive bidding process when the estimated total value of the requirement is more than R350 million.

7.1.6 Had PRASA applied the provisions of their own SCM Policy, specifically with regard to needs assessment required to be completed by an end user in terms of their demand management process as provided for in paragraph 10.2, it would have identified the future needs requirement to have the same technology on the same infrastructure nationally. The same argument can be made with regards to the delivery date for the project. Had there been a proper needs assessment, the need for emergency extension of the tender would have been obviated.

**7.2 Regarding PRASA's alleged improper advancing of an upfront payment to a developer of the City Mall for the construction of an underground train station on the Bridge City Project:**

7.2.1 In the absence of conclusive evidence on what happened regarding PRASA's alleged advance payment on City Mall, I could not adjudicate whether or not such payment was made irregularly or in line with PRASA's SCM Policy and national prescripts. My conclusions on this matter will be covered in Volume 2.

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- 7.3 Regarding the alleged irregular awarding of Dark Fibre and Integrated Communication Systems tender amounting to R800 million to Siemens nationally during the financial year 2009/2010 when it was only advertised in Gauteng:**
- 7.3.1 Having concluded that the PRASA extended the scope of the tender awarded to Siemens for the supply and installation of Dark Fibre and Integrated Communication Systems at Gauteng region to two other regions (Cape Town and Durban), the matter to be adjudicated was whether or not PRASA's conduct in extending the said contract was in contravention of its SCM Policy and applicable national prescripts.
- 7.3.2 To arrive at a fair answer I had to test the manner in which PRASA, in widening the scope for the supply and installation of Dark Fibre and Integrated Communication Systems to two other regions (Cape Town and Durban), was implemented without following a competitive procurement process. The appointment of Siemens to the two other regions was concluded by motivation submitted by the Chief Procurement Officer and approved the Acting Chief Executive Officer at the time.
- 7.3.3 This was in contravention with paragraph 11.3.1 of the PRASA SCM Policy which requires that in procurement of goods or services below R350 million, three written quotations should be obtained from suppliers on the PRASA database. PRASA failed to obtain the three quotations but extended the appointment of Siemens to two other regions without submission of any quotations for the extended scope.
- 7.3.4 PRASA extended the design, supply and installation of the Dark Fibre and Integrated Communication Systems tender, which was advertised and won by Siemens for the Wits and Pretoria region, to the Durban (KZN) and Western Cape

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regions without following open and competitive tender processes in contravention of paragraph 11.3.2. of PRASA SCM Policy and section 217 of the Constitution, amongst others.

7.3.5 While PRASA's argument that ensuring uniform technology in all its regions was a rational decision is sound, PRASA should have identified this factor during the demand management stage of the procurement process as envisaged in paragraph 10.1 of its SCM Policy and advertised the tender for the broader scope. We will also never know if pricing competitiveness was not compromised given the fact that it is not unusual for pricing for small scale projects to be higher than that for large scale projects because of the capital outlay involved.

**7.4 Regarding the alleged irregular termination of all contracts for cleaning services and the improper and appointed Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services:**

7.4.1 Having concluded that PRASA terminated the contracts of seven cleaning companies and later replaced them with Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services, the issues I had to adjudicate was firstly, whether the termination was proper and secondly whether the subsequent appointment of the new companies was in line with the PRASA SCM Policy and applicable national prescripts.

7.4.2 The contracts of the 7 cleaning companies were summarily terminated on 14 March 2012 in contravention of paragraphs 8.1 of contracts between PRASA and the cleaning companies which prescribes a 48 hour notice to be given to the defaulting party to remedy the breach. PRASA replaced these companies with

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Reakgona and Katanga on 15 March 2015, whose services were procured without a transparent and competitive process.

- 7.4.3 Mr. Montana submitted that the appointments of the new companies were in line with the emergency provisions of the PRASA SCM Policy. I have not been persuaded by Mr. Montana's attempt to squeeze this conduct into the emergency provisions of the SCM Policy as no allegation was made or evidence provided to show that the cleaning companies could not have complied with the 24/48 hour rule for remedial action by a defaulting party. The conduct further cannot be said to be consistent with the requirements of administrative justice as envisaged in section 33 of the Constitution and the Promotion of Administrative Justice Act (PAJA), Act no. 3 of 2000. It also cannot be said to be consistent with the notion of a people centred state as envisaged in Batho Pele: White Paper on Transforming Public Service Delivery.
- 7.4.4 The conduct of Mr. Montana with regard to the irregular termination and the subsequent appointment is also inconsistent with the provisions of the PRASA SCM Policy, the PFMA and section 217 of the Constitution which requires a fair, equitable, transparent, competitive and cost effective bidding process.
- 7.4.5 I have also not been persuaded by PRASA's reliance on a unique interpretation of its SCM Policy's urgency provisions as it was its own improper termination of the previous cleaning services that created the urgency. Treasury Regulations specifically state that an own created urgency does not qualify for permissible deviation from the mandatory competitive and transparent bidding processes. Whilst the appointment of the Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services was indeed approved by Mr. Montana, the appointment was not in line with paragraph 11.3.2 of the PRASA SCM Policy.

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**7.5 Regarding the alleged irregular appointment of Sidas Security on a security tender in replacement of National Force Security on the GCEO instruction:**

7.5.1 Having concluded that PRASA appointed Sidas Security on a security tender to replace National Force Security whose contract was terminated, the issue for me to adjudicate was whether the appointment was in line with PRASA's SCM Policy. I was also required to determine whether indeed the appointment was on Mr. Montana's instructions.

7.5.2 The month to month contract of National Force Security was terminated on 20 April 2009 and was awarded to Sidas Security for R3 094 261.00 on the same day without a tender process or sourcing of quotations.

7.5.3 The action was in contravention of paragraph 11.3.5 of the PRASA SCM Policy and paragraph 4.7.5.1 of the National Treasury SCM Guideline of 2004 which provides that an emergency *"is a case where immediate action is necessary in order to avoid a dangerous or risky situation or misery"*.

7.5.4 PRASA did not dispute that the appointment of Sidas Security was improper. In fact, PRASA took disciplinary action against Mr S Motaung.

7.5.5 However, the consequent damage was partially corrected through disciplinary action taken against Mr Motaung, one of the signatories to the appointment.

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- 7.6 Regarding the alleged irregular appointment of Vimtsire Security Services by PRASA on tender number 525/2010/GAU/PS:**
- 7.6.1 Having concluded that PRASA appointed Vimtsire Security Services as one of the security companies under tender 525/2010/GAU/PS amounting to R670 million, on a contract valued at R7 537 680.00 and extended twice for the amounts of R14 441 976.00 and R15 308 494.56 respectively without an advertisement or sourcing competitive quotations, the issue for me to adjudicate was whether the appointment was in line with PRASA's SCM Policy and applicable national prescripts.
- 7.6.2 The compliance framework I considered appropriate was paragraph 11.3.2 of PRASA SCM Policy regulating general procurement to embark on a competitive bidding process when the estimated total value of the requirement is more than R350 million.
- 7.6.3 Therefore the appointment of Vimtsire Security Services by PRASA on a six months contract in the amount of R7 537 680.00 and its extension for further 12 months periods amounting to R14 441 976.00 and R15 308 494.56 respectively, were done in contravention of the PRASA SCM Policy as no competitive bidding process was followed.
- 7.6.4 The failure by PRASA to follow a competitive bidding process and to provide me with a motivation for the emergency purchase which should have been submitted to the GCEO for ratification is in contravention of paragraph 11.3.5 of PRASA SCM Policy.

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- 7.6.5 The contract, which I realised was not signed by PRASA and only had Vimtsire Security Services' signature, also provided for a contract price increase of 31% which is in contravention of paragraph 5.16.1.1.1 of the National Treasury SCM Guide which requires a contract change above 15% to be approved by the accounting officer/authority or his/her delegate.
- 7.7 Regarding the alleged irregular payment of Royal Security invoice for security services:**
- 7.7.1 Royal Security was paid R2.5 million in line with the contract and not R2.8 million as alleged. Therefore the allegation was not substantiated by evidence.
- 7.8 Regarding PRASA's alleged improper advancement of a payment of R600.000.00 to Enlightened Security**
- 7.8.1 Having concluded that PRASA made two advance payments amounting to R681 720.00 and R684 720.00 respectively to Enlightened Security, the issue for me to adjudicate was whether the advanced payment was in line with applicable national prescripts.
- 7.8.2 The compliance framework I considered appropriate was paragraph 15.10.1.2(c) of National Treasury SCM Guidelines which stipulates that sound cash management includes avoiding prepayments for goods or services (i.e. payments in advance of the receipt of the goods or services), unless required by the contractual arrangements with the supplier.
- 7.8.3 PRASA's consistent conduct of the advance payment to Enlightened Security prior to the signing of the contracts and the issuing of "Notices to Proceed" was in

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contravention of paragraph 15.10.1.2(c) of National Treasury SCM Guidelines. The advanced payment by PRASA, without contracts and related documents to regulate the service provisions and payment schedules with Enlightened Security, was not a sound cash management practice.

7.8.4 Having considered the contracts between PRASA and Enlightened Security I could not find any provision for a contractual arrangement catering for any prepayments to be made by PRASA to Enlightened Security.

7.8.5 I have also observed PRASA management's failure to take disciplinary steps against the Manager responsible for the advance payments, Mr Joe Ngcobo despite initially commencing a disciplinary process. The conduct is in violation of the accounting officer's responsibility under section 38 of the PFMA.

**7.9 Regarding PRASA's alleged improper awarding of the contract for the production of *Hambanathi Magazine*:**

7.9.1 Having concluded that PRASA appointed KG Media for the production of the national commuter newspaper, *Kwela Express* also known as *Hambanathi* for a total contract amount of R33 528 222.00 , without a competitive and transparent bid process, the issue for me to adjudicate was whether the appointment was in line with PRASA's SCM Policy and applicable national prescripts.

7.9.2 The legislative framework I have had to consider in determining if the appointment of KG Media by PRASA was in line with the requisite procurement prescripts are the PRASA SCM Policy, particularly paragraph 11.3.1.1 requiring that procurement for goods and services below R350 million, 3 quotations must be sought from the

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supplier database and section 217 of the Constitution which prescribes a fair, equitable, transparent, competitive and cost effective procurement process.

- 7.9.3 Had PRASA followed its SCM Policy, in particular paragraph 11.3.3, which provides that unsolicited bids are generally prohibited unless, considered and approved by the GCEO, the appointment of KG Media would have been proper had the approval of the GCEO been sought. Instead PRASA entered into a partnership agreement with KG Media, which provided for the publication of advertorials and articles; publication of Metrorail timetables; and relevant information; as well as the coverage of Metrorail events in the interests of rail and public transport users, resulting in KG Media's appointment as a producer of *Hambanathi*.
- 7.9.4 It is clear from the policy that unsolicited bids are reserved for unique concepts or offerings that are not available in the market. The service provided by KG Media to PRASA is not unique and does not fall within the criteria set by paragraph 11.3.3 and therefore the conduct of PRASA was in direct contravention of paragraph 11.3.3 of the PRASA SCM Policy which prohibits unsolicited bids.
- 7.9.5 PRASA's appointment of KG Media for the production of *Hambanathi* without a competitive and transparent process was in violation of its SCM Policy particularly paragraph 11.3.1.1 requiring 3 quotations and section 217 of the Constitution which prescribes a fair, equitable, transparent, competitive and cost effective procurement process.
- 7.9.6 I have also noted that in March 2015, and after PRASA was served with a notice in terms of section 7(9) of the Public Protector Act in February 2015, advising of a possible finding of maladministration in respect of the KG Media contract, PRASA

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nonchalantly extended the KG Media contract for a further 3 year period from 1 April 2015 to 31 March 2018 for a total contract amount of R465 669.75 per month which translates to R5 588 000.37 per annum and a total contract amount of R16 764 111.00 without following a proper tender process.

7.9.7 PRASA's appointment and extension of the contracts with KG Media for the *Hambanathi* totalling an amount of R33 528 222.00 is a flagrant contravention of PRASA's own SCM Policy.

7.9.8 Mr Montana's extension of the contract while being aware of an impending finding of maladministration regarding the KG Media contract while having asked for time extension to respond to the section 7(9) notice, is an act of bad faith, which is inconsistent with his responsibilities under section 195 of the Constitution, which requires a high standard of professional ethics and, according to the Constitutional Court, in *Khumalo versus MEC for Education KwaZulu Natal*, which imposes a duty on him to correct an irregularity once his attention has been drawn to it.

**7.10 Regarding PRASA's alleged improper appointment of Mr Ezra Ndwandwe, a Change Management Consultant:**

7.10.1 Having concluded that the allegation that Mr Ezra Ndwandwe's Consultancy Company, and not him personally, was improperly appointed for the amount of R10 833 774. 00 for a period of 12 months is substantiated. The matter to be adjudicated upon was whether or not Mr Montana's conduct in the said appointment was in line with PRASA SCM Policy and national legislative prescripts.

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- 7.10.2 The conduct of Mr Montana in the appointment of Ndwandwe Consultancy for the Value Creation and Culture Change process at PRASA for the amount of R6 220 800.00 without requiring three quotations from suppliers in the PRASA supplier database was in contravention of paragraph 11.3.1.1 of the PRASA SCM Policy. The contract was extended for a further 6 months with the contract amount variation of R4 612 974.00 exceeding 40% in contravention of paragraph 5.16.1.1.1 of the National Treasury SCM Guidelines.
- 7.10.3 I could not accept Mr Montana's assertion that the contract with Ndwandwe Consultancy was an employment contract for a Special Advisor and that he as GCEO had the power to approve. My conclusion is that the contract was for the appointment of Ndwandwe Consultancy as a juristic person, and not Mr Ndwandwe as a natural person. I also could not accept an attempt to pass the contract as an emergency intervention in line with the emergency provisions of paragraph 11.3.5 of the PRASA SCM Policy as change management was not addressing a situation envisaged in the emergency procurement provisions, which include single sourcing.
- 7.10.4 The appointment of Ndwandwe Consultancy by Mr Montana was therefore in contravention of PRASA's own SCM Policy and section 217 of the Constitution.
- 7.10.5 From the evidence it is clear that Mr Ndwandwe's Consultancy's appointment was triggered by an existing relationship, which had included an excursion that took place immediately before the impugned contract was initiated. It is also clear that no process was followed to establish if any other agency offered similar services. More importantly, no demand management exercise preceded the engagement. Unfortunately, the investigation did not examine what the excursion mentioned in the procurement memorandum dated 16 September 2008 was for, whether or not

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PRASA paid for it and how Mr Ndwandwe's Consultancy had been procured it as the impugned engagement apparently flows from that excursion.

**7.11 Regarding PRASA's alleged improper awarding of a CCTV cameras tender to Mr Vusi Twala, a board member at the time:**

7.11.1 I have been unable to conclude whether the CCTV cameras tender was awarded to Mr Vusi Twala, a member of PRASA Board.

7.11.2 In order for me to adjudicate the matter, I would need to have had sight of the documents used in the procurement process for the tender in question, which PRASA failed to provide me with.

7.11.3 However, the only two documents provided to me by PRASA were the Managers' disclosure of interest, other directorship and interest in contract questionnaire form completed by Mr Vusi Twala, declaring that he is a Director at several companies and a member in (2) two close corporations, as well as the PRASA Board's Minutes of a meeting held on 1 December 2008 reflecting Mr Vusi Twala's disclosure of interest in the CCTV cameras Project.

7.11.4 What is however apparent from these documents is that Mr Vusi Twala indeed had some or other interest in the CCTV cameras project. This is due to the minutes reflecting that the PRASA Board has accepted that Mr Vusi Twala has fully declared his interest with regard to the CCTV cameras project.

7.11.5 I could not arrive at a conclusion due to the fact that the evidence regarding the awarding of the CCTV cameras project including the details of the owners of the company was not provided to me.

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**7.12 Regarding PRASA's alleged improper extension of the scope for the marketing and communications on tender number HO/M&C/305/07/2009 awarded to Brand Leadership:**

7.12.1 Having concluded that the allegation that PRASA improperly increased the scope and price of a marketing and communications tender awarded to Brand Leadership is substantiated, the issue for me to adjudicate on is whether or not PRASA's conduct in increasing the scope and price in the said contract was in contravention of its SCM Policy and applicable national prescripts.

7.12.2 To arrive at a fair answer, I had to test PRASA's manner in which the widening of the scope and the price increase of a marketing and communications tender was concluded. PRASA Bid Adjudicated Committee (BAC) recommended the scope of a tender at the value of R12 900 000.00 and it was later increased beyond the advertised scope and the price was consequently increased to R29 528 000.00 by PRASA's CTPC with the approval of the GCEO. The decision by the CTPC to extend the scope and increase the price to R29 528 000.00 for the marketing and communications tender without request and recommendation was in contravention of paragraph 9.4.7 of PRASA SCM Policy which provides that the CTPC has the power to review and approve requests for extension of contracts as per Delegation of Authority. The project timeline was also stretched from September 2009 to October 2009, by an additional 6 months, to March 2010, which amounts to "scope creep".

7.12.3 In increasing the scope and price of the Brand Leadership tender in excess of what was advertised, the conduct of the PRASA's CTPC was in contravention of paragraph 9.4.7 of the PRASA SCM Policy and paragraph 5.16.1.1.1 of the

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National Treasury SCM Guideline of 2004 setting out a proper process for demand management and the process to be followed in extending the scope of a contract.

**7.13 Regarding the GCEO's alleged improper appointment of Mr Edwin Lekota on a tender for the Development of a Contingency Emergency Preparedness Programme for Metrorail:**

7.13.1 Having concluded that the allegation that Mr Montana appointed Mr Edwin Lekota's Lekga Investment Holdings, for the ISO 9001: 2000 compliance work without a competitive process, the matter for determination was the implication for compliance with SCM Policy and other applicable national prescripts.

7.13.2 The appointment, which was an appointment in confinement or as a single source clearly deviated from the SCM Policy. It could not be justified on special skills as no evidence of Mr Lekota's special skills was mentioned in the motivation for appointment.

7.13.3 Furthermore there was no emergency as this appointment was not linked to the burning of trains which had necessitated an investigation. In this regard, I am unable to accept Mr Montana's submission that the appointment of Mr Edwin Lekota, former CEO of the predecessor of PRASA on a panel with, Dr Chris Dutton and Mr Friedel Mulke as part of a Board of Inquiry following the burning of trains in Soshanguve, City of Tshwane, Gauteng.

7.13.4 However, I am encouraged by Mr Montana's undertaking in his response to my provisional findings, to ensure that such experts are, in future, invited to be part of an existing panel of experts in the PRASA database.

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- 7.13.5 The appointment was accordingly in contravention of the PRASA SCM Policy, the PFMA, the PPPFA and s217 of the Constitution.
- 7.14 Regarding the GCEO's alleged improper awarding of a tender HO/INF(s) 203/06/2010 for technical assistance and supervision for the national signalling project to Siyaya DB, a company of an alleged friend of the GCEO:**
- 7.14.1 Having concluded that PRASA's improper appointment of Siyaya DB, a company of an alleged friend of Mr Montana is not substantiated, no evidence was found to show that Mr Makhensa Mabunda was or is Mr Montana's friend and that such friendship informed his company's appointment.
- 7.14.2 To arrive at a fair answer, I had to consider the process followed by PRASA in the appointment of Siyaya DB, as provided for by the PRASA SCM Policy and national legislative prescripts. It is evident that PRASA did appoint Siyaya DB even though they scored slightly lower than Mr Mott Macdonald, on tender HO/INF/203/06/2010 for rendering of technical assistance and supervision for the national signalling project. The process followed an open and competitive tender process.
- 7.14.3 I have further established from the bid documents that although Mr Mott Macdonald scored 219.67 points while Siyaya DB scored 216.72 points, PRASA appointed Siyaya DB on account of pricing uncertainty in the Mott Macdonald bid and failure by the same to meet the Black Economic Empowerment requirements of PRASA.

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- 7.15 Regarding PRASA's alleged improper awarding of a tender for the Park Station Development Framework to ARUP, a company associated with a board member:**
- 7.15.1 I have concluded that the allegation that ARUP was associated with a PRASA Board member when the Park Station Development Framework tender was processed was not substantiated by evidence because at the time of the said appointment of ARUP the board member concerned was indeed a Director at ARUP from 09 February 2011, she made the necessary disclosures to PRASA on 20 July 2011.
- 7.15.2 The second issue that I had to adjudicate upon was whether or not the appointment of ARUP for the Park Station Development Framework tender was proper, taking into consideration the PRASA SAM Policy and national legislative prescripts.
- 7.15.3 PRASA appointed ARUP on 27 November 2009 on a contract for the Park Station Development Framework for the amount of R3 898 940.00 without following proper tender procurement processes. The direct appointment of ARUP without engaging other suppliers was in contravention of paragraph 11.3.7 of PRASA SCM Policy regarding single source/confinement which requires motivation for the GCEO's approval and ratification of single source or confined procurement. The appointment of ARUP was also in contravention of section 217 of the Constitution.
- 7.15.4 PRASA concurred with the allegation that a proper procurement process was not followed in the appointment of ARUP, as required by its own SCM Policy and took action against the persons implicated in the appointment concerned.

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**7.16 Regarding PRASA's alleged improper engagement of various construction companies in respect of 2010 Soccer World Cup Project and the overspending of R2 billion on its CAPEX Budget:**

7.16.1 I have been unable to conclude whether or not there was alleged improper engagement of various construction companies in respect of the 2010 Soccer World Cup Project.

7.16.2 In order for me to adjudicate the matter, I would need to have had sight of the documents used in the procurement process for the project in question, which PRASA failed to provide me with.

7.16.3 However, except for the explanation provided in response to my investigation in which PRASA denied any impropriety in the appointment of the companies for the 2010 Soccer World Cup Project, no documents relating to the said allegations were provided.

7.16.4 I wish to also point out that the Complainant has not provided any details of which construction companies were allegedly involved in the 2010 Soccer World Cup Project. The allegations were vague and lacked details.

7.16.5 I could not arrive at a conclusion due to the fact that the evidence regarding the appointment of construction companies for the 2010 Soccer World Cup Project was not provided to me.

7.16.6 I am unable to make a final determination regarding the over expenditure incurred by PRASA during 2008/2009 and 2009/2010 respectively due to PRASA's failure to provide me with information relating to this allegation.

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**7.17 Regarding PRASA's alleged failure to investigate the theft of the buses of its subsidiary, Autopax:**

7.17.1 I have concluded that the allegation that PRASA failed to investigate the theft of buses of its subsidiary, Autopax, is not substantiated.

7.17.2 I have been provided with records that confirm that PRASA conducted an investigation and internal disciplinary hearings regarding the theft of the Autopax buses which led to the suspension of Mr Frans Makgaba as well as the dismissal of the Executive responsible for security, Mr Chris Brand for gross negligence and dereliction of duty. Furthermore, cases were registered with the SAPS in respect of the theft of the buses.

**7.18 Regarding PRASA's alleged improper awarding of a guarding contract to Futuris Guarding in April 2010 at Autopax City to City:**

7.18.1 Having concluded that PRASA appointed Futuris Guarding on a security contract at an amount of about R10.6 million for a six month contract, the matter to be adjudicated upon was whether or not the appointment was in line with PRASA SCM Policy and applicable national legislative prescripts.

7.18.2 To arrive at a fair answer, I had to consider the process followed by PRASA in the appointment of Futuris Guarding, as provided for by the PRASA SCM Policy and national legislative prescripts. I have established that PRASA did appoint Futuris Guarding on 3 March 2010 on a six months security contract for Metrorail Gauteng North region for the amount of R10.629 million without a transparent and competitive bidding process.

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- 7.18.3 PRASA's conduct was in contravention of paragraph 11.3.1.1 of the PRASA SCM Policy which provides that three written quotes should be obtained from the supplier on the database. It was also at odds with paragraph 11.3.7 of PRASA SCM Policy regarding single source/confinement which requires the decision to make use of a single source and to be motivated for approval and ratifications by the GCEO. The appointment is also in contravention of the provisions of section 217 of the Constitution.
- 7.18.4 The appointment was also in contravention of paragraph 11.3.5 of the PRASA SCM Policy which requires that procurement for services during an emergency must be motivated for approval and ratifications by the GCEO. Although security unarguably involves danger as envisaged in the emergency provisions of paragraph 11.3.5 of the PRASA SCM Policy, I am not persuaded that the procurement of the services of Futuris Guarding conforms to the requirements of urgency because the motivation was not ratified and approved by the GCEO.
- 7.18.5 I have observed that PRASA having been aware of the improper award of the security contract to Futuris Guarding, it unduly failed to cancel the said contract.
- 7.19 Regarding PRASA's alleged delayed payment and improper termination of the Rasakanya Builders contract on 1 November 2012:**
- 7.19.1 I have concluded that the allegation that PRASA improperly terminated the contract with Rasakanya Builders is not substantiated.
- 7.19.2 I have been provided with records that confirm that PRASA's contract with Rasakanya Builders for cleaning services was extended on a month to month

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basis with effect from 1 January 2012. PRASA terminated the contract on 30 October 2012 and accordingly gave Rasakanya Builders a month's termination notice on 28 September 2012 in compliance with their contractual obligations.

7.19.3 In the absence of conclusive evidence in the form of payment schedules relating to PRASA's alleged failure to pay Rasakanya Builders for services provided, I could not adjudicate whether or not indeed PRASA failed to pay Rasakanya Builders on time for services rendered. My conclusions on this matter will be covered in Volume 2.

**7.20 Regarding the GCEO's/PRASA's alleged improper implementation of an upfront payment of the amount of R 80 million for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds amounting to fruitless and wasteful expenditure:**

7.20.1 Having concluded that PRASA entered into various agreements with FIFA and MATCH (representing FIFA) during the FIFA World Cup to deliver transport services to the FIFA family and the general public, the issue for me to adjudicate was whether or not PRASA made an advance payment in the amount of R80 million to FIFA without proper approval, budget or allocated funds which resulted in fruitless and wasteful expenditure.

7.20.2 I am satisfied with PRASA's contention that the government of South Africa concluded a Memorandum of Understanding (MOU) with FIFA which led to an agreement between PRASA and MATCH wherein PRASA would provide buses to transport the FIFA family. Furthermore PRASA entered into a value in kind agreement (VIK) with FIFA, wherein PRASA was granted national supporter status by FIFA, which allowed PRASA to market its service for the benefit of soccer fans

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and the commuting public. The agreement allowed PRASA to fulfill its mandate and transport over 1.4 million spectators by train and bus to stadia and fan parks as well as transporting FIFA delegates for the total value of R80 million.

- 7.20.3 I am further satisfied that there was no exchange of money between PRASA and FIFA in terms of the agreement. The agreement outlined that the only exchange of payment to be made was from PRASA to Autopax for the amount of R80 million in settlement of the amounts otherwise due from MATCH under the agreement equal to the anticipated contract value less the actual cash value.
- 7.20.4 I have also observed that the agreement between FIFA and PRASA does not have any clause that indicates that PRASA would recoup any expenditure through sales of tickets as alleged.
- 7.20.5 I am of the view that for Autopax to be able to perform its obligations under the agreement, PRASA would have had to provide the R80 million upfront payment to allow Autopax to purchase the 420 coaches necessary to transport spectators and FIFA delegates.
- 7.20.6 Furthermore the agreement between PRASA and MATCH, which provided for the payment of R80 million to Autopax, was signed by Mr Montana based on his delegated authority from the PRASA Board which authorises him to approve transactions up to the threshold of R100 million.

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**7.21 Regarding PRASA's alleged improper incurring of R2.2 billion over expenditure on PRASA's operations budget in 2009/10 financial year:**

7.21.1 Having concluded that the allegation that PRASA incurred an over expenditure for the financial year 2009/10 is substantiated, the issue for me to adjudicate was whether or not PRASA incurred an over expenditure of R2.2 billion.

7.21.2 To arrive at a sound conclusion I had to consider PRASA's Annual Financial Statements for the financial year 2009/10 and take into account section 1 of the PFMA which defines unauthorised expenditure as overspending of a vote or main division within a vote.

7.21.3 In the absence of conclusive evidence that supports an over expenditure of R2.2 billion by PRASA, I was able to determine that the operations budget was exceeded by R523 792 767.00 in 2009/10 financial year. In terms of the PFMA, the overspending of the allocated vote by PRASA should be viewed as unauthorised expenditure.

**7.22 Regarding PRASA's failure to spend a subsidy of R500 million received for Shosholozza Meyl for the 2009/2010 period and not use it for its intended purpose:**

7.22.1 I have concluded that the allegation that PRASA failed to spend the subsidy received for Shosholozza Meyl for 2009/2010 financial year is not substantiated.

7.22.2 To arrive at a fair answer, due consideration was given to the budgets, Financial Statements and documentation received from National Treasury that captures information about the subsidy received by PRASA in respect of Shosholozza Meyl.

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- 7.22.3 I have been able to confirm that SARCC, the predecessor to PRASA, received R500 million in 2008 for Shosholoza Meyl operations, these were paid over in full to Transnet which kept the operations of Shosholoza Meyl running and incurred huge costs for this discontinued business.
- 7.22.4 For the years 2009 and 2010 PRASA was allocated subsidies for Shosholoza Meyl to the amounts of R450 million and R424 million respectively. PRASA further stated that, as things currently stand, it does not receive any subsidy from government to operate Shosholoza Meyl, and that it has been running this business using its own resources.
- 7.22.5 I could not find any proof of a request of (R1 billion) from National Treasury in respect of Shosholoza Meyl by PRASA in 2009/10 financial year. The only available evidence indicates that an amount of R447 700 000 was originally requested from National Treasury in 2009/10 financial year followed by another additional request of the same amount.
- 7.22.6 The assertion made by PRASA confirming receipt of the said subsidy for Shosholoza Meyl cannot be confirmed as it was not separately disclosed in PRASA's Annual Financial Statements. I was also unable to confirm if the subsidy was indeed used for its intended purpose as the operational expenditure for Shosholoza Meyl was not reflected separately in the overall budget of PRASA.
- 7.22.7 However, what can be deduced from the evidence was that Shosholoza Meyl was not a profitable business and required an operational budget beyond the allocated subsidy received from National Treasury.

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- 7.23 Regarding PRASA's alleged incurring of rental expenditure on Jorissen's Place after vacating the building and before the expiry of the contract resulting in fruitless and wasteful expenditure:**
- 7.23.1 Having concluded that PRASA continued to incur rental expenditure after their vacation of the Jorissen Building before the expiry of its lease agreement, what I had to consider was whether the rental payments indeed constitute fruitless and wasteful expenditure as envisaged by the PRASA SCM Policy and the PFMA.
- 7.23.2 I have observed from the information provided that PRASA (SARCC) vacated Jorissen Building on the instruction of its GCEO, Mr Montana, at the end of 2009 whereas the lease agreement expired on 30 November 2011. PRASA did not exercise its option to sublet the building and continued to pay rental for a vacant building for 20 months.
- 7.23.3 The argument advanced by Mr Montana that PRASA continued to use the building to house its IT network, cannot be accepted. The continual payment of rental by PRASA for Jorissen Building between the end of 2009, when it vacated the premises and 30 November 2011 (approximately 20 months) was in contravention of section 38(1) (b) of the PFMA which provides that an accounting authority of a public institution must take effective and appropriate steps to prevent irregular, fruitless and wasteful expenditure.
- 7.23.4 The hasty vacation of Jorissen Building resulting in continued full payment for unused lettable space for 20 months, cannot be consistent with the efficiency and cost effective dictates expected in state affairs under section 195 of the Constitution and the standards set for proper handling of public funds under the PFMA, particularly section 51 (b) (ii) thereof.

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- 7.23.5 I am further not convinced that Cabinet ordered PRASA to hastily move to the new Umjantshi Building to consolidate its operations, regardless of wasteful financial consequences and in disregard of its own demand management provisions of its SCM Policy.
- 7.24 Regarding PRASA's alleged improper procurement of Umjantshi House from Transnet in September 2009:**
- 7.24.1 I have been unable to conclude whether the procurement of Umjantshi House from Transnet in September 2009 was improper.
- 7.24.2 In order for me to adjudicate the matter, I would need to have had sight of the documents used in the procurement process for the property in question, which PRASA failed to provide me with.
- 7.24.3 The only evidence provided indicates that an agreement between PRASA and Transnet in respect of sale of Umjantshi House for the sum of R1.3 million which was signed on 28 September 2009 by the GCEO on behalf of PRASA and by unidentified individual on behalf of Transnet on 13 January 2010.
- 7.24.4 The purchase of Umjantshi House should have been guided by The Constitution, PFMA and Treasury Regulation.
- 7.24.5 Evidence outlined above leads to the conclusion that there was a sale agreement between PRASA and Transnet in respect of sale of Umjantshi House in September 2009.

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- 7.24.6 I could not arrive at a conclusion due to the fact that the evidence regarding the acquisition of the Umjantshi House was not provided to me.
- 7.25 Regarding PRASA's alleged improper incurring of a rental expenditure on Intersite Building after vacating the building and before the expiry of the contract resulting in fruitless and wasteful expenditure:**
- 7.25.1 Having concluded that PRASA continued to incur rental expenditure after their vacation of the Intersite Building before the expiry of its lease agreement, what I had to consider was whether the rental payments indeed constitute fruitless and wasteful expenditure as envisaged by the PRASA SCM Policy and the PFMA.
- 7.25.2 Documentation in respect of the Intersite Building was not provided by PRASA.
- 7.25.3 However, from the response received from PRASA it is clear that PRASA continued with rental payments for the Intersite Building even after the building was vacated. The continuation of payment on the lease without occupation for period of 20 months amounts to fruitless and wasteful expenditure.
- 7.25.4 PRASA vacated the Intersite building about 20 months before the lease expiry date and continued with rental payments for the building for the vacant building until the expiry of the lease.
- 7.25.5 While the building might well have been used for training purposes as per Mr Montana's latest submission in response to the Provisional Report, the hasty vacation of the building resulting in the payment of full rental for unused lettable space, cannot be said to be consistent with the PFMA's dictates on efficient and

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prudent use of public funds and the dictates of section 195 of the Constitution regarding accountability in public administration.

7.25.6 I need to add that this was the first time Mr Montana made this assertion. All along the justification for vacating and continuation of the rental payment for the lease was that it was per the Cabinet directive. This new explanation conveniently came long after an inspection *in loco* could be conducted.

7.25.7 More specifically, in hastily vacating the Intersite Building and paying rental for about 20 months for unused lettable space, PRASA acted in contravention of its SCM demand management provision and section 38(1) (c) (ii) read with 51 (b) (ii) of the PFMA and the Treasury Regulations, which provides that an accounting authority of a public institution must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure.

**7.26 Regarding PRASA’s alleged improper termination of contracts of its Executives resulting in fruitless and wasteful expenditure:**

7.26.1 Having concluded that PRASA terminated the services of 5 of its Executives between 2008 and 2013, the issue for me to adjudicate was whether or not the terminations followed proper procedures and were in line with PRASA’s Disciplinary Code and Procedure, the Labour Relations Act and the Constitution.

7.26.2 PRASA should have complied with their Disciplinary Code and Procedure, in particular paragraph 4.4 which requires a disciplinary hearing to be conducted and finalised within a period of 30 days. However from the evidence provided to me, it is apparent that PRASA failed to comply with its own policies.

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- 7.26.3 Despite PRASA's failure to provide me with records pertaining to the procedure it followed in the termination of the Executives' contract, It can be deduced from the CCMA and Labour Court records provided to me by some of the Executives, that PRASA in most cases were found to have been at fault and not complying with paragraph 4.4 of PRASA's Disciplinary Code and Procedure which resulted in the CCMA overturning some of the terminations.
- 7.26.4 From the records provided to me, the following Executives were unfairly dismissed:
- 7.26.4.1 Mr Cromet Molepo was dismissed by Mr Montana during 2011 and reinstated during August 2012 by a CCMA Arbitration Award with an order against PRASA to pay Mr Molepo an arrear salary in the amount of R1 174 443.00.
- 7.26.4.2 Mr Salani Sithole was dismissed on 8 October 2008 by PRASA and he referred a dispute to the CCMA registered under case number GAJB 32811/08 on 26 November 2008 on the grounds of alleged unfair dismissal. PRASA settled for the dismissal of Mr Sithole for the amount of R 972 150.00 and after tax a net payment of R 583 290.00 on 21 October 2009.
- 7.26.4.3 Mr Viwe Mlenzana was dismissed by PRASA and he referred the matter to the Labour Court under case number: J1687/11A. The Labour Court document was signed on 8 November 2011 by Mr Viwe Mlenzana and the representative from PRASA for a settlement in favour of Mr Viwe Mlenzana in the amount of R988 936.07 before tax was paid. PRASA was to pay the legal costs on party and party costs, occasioned by its earlier non-compliance with the Settlement Agreement.

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- 7.26.4.4 Ms Sindi Mabaso-Koyana, former CFO of PRASA entered into a settlement agreement with PRASA after her contract was terminated. The settlement agreement was signed by Ms Mabaso-Koyana on 30 April 2013 and by an unidentified PRASA representative on an unclear date. PRASA agreed to pay Ms Mabaso-Koyana the equivalent of seven months' salary calculated as follows  $7 \times 265\,092.75 = R1\,855\,649.25$  as a settlement amount.
- 7.26.4.5 The information regarding Mr Sisa Mtwana was not provided by PRASA
- 7.26.5 While Mr Montana makes a valid point in his submission to my Provisional Report, that administrative scrutiny by this office, should not unduly circumscribe or encroach on the right of management to discipline employees, I have taken notice of the fact that PRASA's conduct regarding failure to follow its own disciplinary procedures and general labour law provisions on procedural fairness was heavily sanctioned by the Labour Court.
- 7.26.6 I have observed that PRASA subsequently paid labour dispute settlements amounting to R3 816 735.32, principally due to procedural irregularities in the disciplinary steps taken against involved officials, which payments can be said to constitute fruitless and wasteful expenditure as envisaged in section 38(1)(c) (ii) of the PFMA and the Treasury Regulation 9.1.1 which provide that an Accounting Authority/Officer of a public institution must take effective and appropriate steps to prevent, losses resulting from criminal conduct, and expenditure not complying with operational policies of the public entity.

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**7.27 Regarding PRASA's alleged improper suspension of its employees:**

- 7.27.1 Having concluded that PRASA suspended several employees between 2009 and 2011, the issue for me to adjudicate was whether or not the suspensions followed proper procedures and were in line with PRASA's Disciplinary Code and Procedure, the Labour Relations Act and the Constitution.
- 7.27.2 PRASA should have complied with their Disciplinary Code and Procedure, in particular paragraph 4.4 which requires a disciplinary hearing to be conducted and finalised within a period of 30 days. However from the evidence provided to me, it is apparent that PRASA failed to comply with its own policies.
- 7.27.3 Despite PRASA's failure to provide me with records pertaining to the procedure it followed in the suspension of these employees, It can be deduced from the memorandum provided by the Complainant that PRASA put employees on prolonged periods of suspension with pay without instituting and finalising disciplinary proceedings within the mandatory 30 days period as stipulated in paragraph 4.4 of its Disciplinary Code and Procedure.
- 7.27.4 In my view, PRASA failed, without good reason, to institute and finalise disciplinary action against the employees concerned within thirty (30) calendar days as required by the Disciplinary Code which provides at paragraph 4.4 that disciplinary hearings shall be conducted and finalised within a period of thirty (30) calendar days.
- 7.27.5 The seven(7) officials mentioned below support the conclusion of a pattern of suspensions without following proper procedure in that:

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- 7.27.5.1 Ms Siphokazi Ndaba was suspended on 11 February 2010 pending disciplinary hearing but dismissed on 18 March 2011. The costs implications to PRASA was R364 000.00.
- 7.27.5.2 Mr Martin Hlongwane was suspended on 23 November 2011 for a lengthy period exceeding 30 days and the cost implications to PRASA as a result was R62 000.00.
- 7.27.5.3 Mr Sello Motaung was suspended on 1 October 2009 for a period of two years at a cost implication to PRASA amounting to R1 200 000.00.
- 7.27.5.4 Mr Frans Makgaba was suspended on 13 July 2010 and the suspension lifted after a period of 10 months at a cost implication to PRASA amounting to R630 000.00.
- 7.27.5.5 Mrs Priscilla Selele was suspended on 6 October 2011 for a period of 4 months at a cost implication to PRASA amounting to R126 000.00.
- 7.27.6 The conduct of PRASA in habitually suspending employees for periods exceeding thirty (30) calendar days with pay and without good reason, was in contravention of paragraph 11.1 of its Disciplinary Code and Procedure which provides that the employer has the right to suspend an employee with pay for a period not exceeding thirty (30) calendar days and also in contravention of paragraph 4.4 of PRASA Disciplinary Code and Procedure and Schedule 1 Part VII of the Basic Conditions of Employment Act which provides that employment practices shall ensure employment fairness.

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- 7.27.7 It is not unreasonable to draw a nexus between the payment of salaries for staff sitting at home with pay for long periods of time and failure to manage employment relations appropriately, and the conclusion that the payment of salaries without any value derived therefrom was irregular and constitutes fruitless and wasteful expenditure.
- 7.27.8 PRASA's conduct in this regard amounts to fruitless and wasteful expenditure in contravention of the provisions of section 38(1) (c) (ii) read with section 51 (b) (ii) of the PFMA while being at odds with the financial prudence and efficiency requirements of section 195 of the Constitution.
- 7.28 Regarding the Chairperson of the PRASA Board's alleged failure to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory service to PRASA on the Rolling Stock and Recapitalisation Project:**
- 7.28.1 I have been unable to conclude whether Mr Buthelezi, former Chairman of the PRASA Board, failed to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company alleged to be providing advisory services.
- 7.28.2 In order for me to adjudicate the matter, I would need to have had sight of the disclosure documents completed by Mr Buthelezi, which PRASA failed to provide me with. Mr Montana only offered an explanation disputing the allegation and providing the names of companies involved in the said advisory services whilst denying that Cadiz was not involved in the Rolling Stock and Recapitalisation Project.

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7.28.3 I could not arrive at a conclusion due to the fact that the evidence regarding the failure of Mr Buthelezi to disclose and manage his interest in Makana, a subsidiary of Cadiz, was not provided to me.

**7.29 Regarding Dr Bridgette Gasa, a PRASA Board member's alleged failure to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company providing consultancy services to PRASA:**

7.29.1 I have concluded that the allegation that the then PRASA Board Member, Dr Bridgette Gasa, failed to disclose and manage a conflict of interest arising from her appointment to the Board while two companies she had an interest in provided services to PRASA, is not substantiated.

7.29.2 I have been provided with records that confirm that Dr Gasa was indeed a Director at ARUP from 09 February 2011 and that she made the necessary disclosures to PRASA on 20 July 2011.

7.29.3 ARUP SA (Pty) Ltd was indeed awarded a contract by PRASA on 21 June for the Park Station Development Framework; however the contract was for R3.8 million 2011 which would not have required Board approval.

**7.30 Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, the wife of Mr. Bushy Boshielo, the erstwhile member of the PRASA Board as General Manager of Autopax:**

7.30.1 I have established that PRASA first contended that Ms Boshielo was appointed on 06 April 2010 through a headhunting process for the position of Executive

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Manager: Business Development after the position was advertised in the Sunday Times of 29th November 2009.

7.30.2 I noted further that Mr Montana in response to my provisional findings changed the tune to state that PRASA's initial submission was made in error as Ms Boshielo was appointed through a recruitment and selection process and was selected from amongst other candidates. However, PRASA failed to provide me with recruitment documents to substantiate their assertion.

7.30.3 Except for the job advertisement, the employment offer and the acceptance letter, PRASA failed to provide me with recruitment memoranda in respect of the headhunting and/or recruitment process followed in the appointment of Ms Boshielo.

7.30.4 Accordingly I have deferred my finding on the alleged nepotism regarding the appointment of Ms Boshielo as PRASA has failed to provide the selection and appointment memoranda and related documents.

**7.31 Regarding the GCEO's alleged improper appointment of Mr Joel Chimanda at a cost of R2 million as a Special Advisor to PRASA:**

7.31.1 Having concluded that Mr. Montana appointed AR Chimanda Consulting for advisory services, the matter for me to adjudicate was whether or not the appointment was in line with PRASA SCM Policy and national legislative prescripts.

7.31.2 Whilst it was argued by PRASA that Mr Chimanda, representing AR Chimanda Consulting, had been appointed as a Special Advisor and that no recruitment

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process had to be followed, as it was the prerogative of the GCEO to appoint Special Advisors, is sound. I found that Mr Montana appointed Mr Chimanda's company, AR Chimanda Consulting, which required that a procurement process be utilised. Therefore, the appointment is a procurement contract and cannot be an employment contract as a juristic person cannot be an employee thus making the contract incapable of being defended under the GCEO's powers to appoint Special Advisors.

7.31.3 Furthermore the appointment of AR Chimanda Consulting was not preceded by a competitive bid process, nor is he provisions of the PRASA SCM Policy.

7.31.4 I have established that the appointment was not transparent and competitive and was in contravention of paragraph 11.3.1.1 of PRASA SCM Policy which requires three quotations to be obtained for contracts not exceeding R350 million. Further, I am of the view that AR Chimanda Consulting is not offering exclusive specialised services entitling him to the sole provider as stipulated in paragraph 11.7.1 regarding the appointment of consultants. It was also in contravention of the provisions of section 217 (1) of the Constitution regarding fair, equitable, transparent and cost effective procurement processes.

**7.32 Regarding PRASA's alleged improper replacement of the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa without following proper appointment process:**

7.32.1 I have concluded that the allegation that Mr Ramutloa was improperly appointed to the position of Group Executive HR, is not substantiated. I have found that the appointment of Mr Ramutloa followed a proper recruitment process in line with the Recruitment and Selection Policy.

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- 7.32.2 From the recruitment documents provided, I was able to determine that prior to Mr Ramutloa's appointment PRASA advertised the position of Group Executive HR internally and Mr Ramutloa was shortlisted along with another internal candidate. According to the score sheets, Mr Ramutloa scored the highest.
- 7.32.3 No evidence could be found to support the allegation that Mr. Ramutloa is Mr Montana's uncle.
- 7.33 Regarding PRASA's alleged failure to take disciplinary action against staff members allegedly involved in fraudulent Electronic Funds Transfers (EFT):**
- 7.33.1 I have concluded that indeed PRASA failed to discipline some of the employees involved in EFT transfers.
- 7.33.2 I have established that disciplinary action was taken against one of the six (6) employees found responsible by a Deloitte forensic investigation, for security lapses that led to the fraudulent electronic transfer of PRASA funds amounting to R8.1million in its KwaZulu Natal and Gauteng bank accounts.
- 7.33.3 PRASA took action against Ms Pallaiyiah but inexplicably failed to take disciplinary action against the other five individuals recommended for possible disciplinary as mentioned in paragraph 13.3 of the Deloitte Report of 26 February 2010, to wit:
1. Mr Ngobeni;
  2. Mr Chetty;
  3. Ms Pillay;
  4. Ms Gcabashe; and
  5. Mr Mabaso.

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- 7.33.4 I am of the view that PRASA's failure to take action against certain officials involved in the fraudulent transaction outlined in the Deloitte Report is in contravention of the responsibilities of the Board and the GCEO in terms section 38 (1) (d) of the PFMA which enjoins them, among other things, to take effective and appropriate disciplinary steps against any official in the service of the department, trading entity or constitutional institution who contravenes or fails to comply with a provision of this Act.
- 7.33.5 Further, Mr Montana's conduct is in contravention of section 38(1)(c)(ii) which provides that an Accounting Officer must take effective and appropriate steps to prevent losses resulting from criminal conduct.
- 7.33.6 However, and quite commendably, PRASA subsequently introduced stringent measures to remedy the security breach and avoid future recurrence as well as cancelling their banking services with the bank involved.
- 7.34 Regarding the GCEO's alleged improper Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and returned by SAA flight at an estimated cost of R170 000 and which amounts to fruitless and wasteful expenditure:**
- 7.34.1 I have been unable to conclude whether or not there Mr. Montana went on a Blue Train trip to Cape Town with 10 female companions between 24 to 27 September 2009 resulting in fruitless and wasteful expenditure of R170 000.00.

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- 7.34.2 The evidence regarding this issue is inconclusive. However the evidence received from the Complainant apparently places Mr Montana in the alleged situation. Mr Montana has denied the allegation.
- 7.34.3 In order for me to adjudicate the matter, I would need to have had sight of the documents relating to the trip in question, which PRASA failed to provide me with. Accordingly, I have deferred my finding on this allegation and will be dealt with in volume 2 of this report.
- 7.35 Regarding PRASA's alleged improper payment of salaries to Mr Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure, and did PRASA's GCEO in relation thereto mislead the EXCO and the PRASA Board:**
- 7.35.1 I have been unable to conclude whether or not there was an improper payment of salaries made to Mr Mabe, the former Executive Corporate Affairs Manager, during 2008/2009 after his resignation from PRASA which resulted in fruitless and wasteful expenditure.
- 7.35.2 In order for me to adjudicate the matter, I would need to have had sight of the documents relating to the payment in question and personnel file of Mr Mabe while in the employment of PRASA. However, PRASA failed to provide me with the abovementioned documentation and accordingly I have deferred my finding on this allegation and will be dealt with in volume 2 of this report.

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**7.36 Regarding PRASA's alleged improper transfer of Mr Stephen Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability thereby amounting to maladministration:**

7.36.1 I have been unable to conclude whether or not there was an improper transfer of Mr Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability.

7.36.2 In order for me to adjudicate the matter, I would need to have had sight of the documents relating to the transfer in question and personnel file of Mr Ngobeni. However, PRASA failed to provide me with the abovementioned documentation and accordingly I have deferred my finding on this allegation and will be dealt with in volume 2 of this report.

7.36.3 No evidence was found in support of the allegation that Mr Ngobeni is Mr Montana's cousin.

**8. FINDINGS**

After a careful examination of the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by PRASA, my findings are the following:

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- 8.1. Regarding PRASA's alleged improper extension to other stations nationally, a tender for the installation of high speed passenger gates worth R800 million to Siyangena Technologies in 2009/2010 initially advertised for the Doornfontein station, Gauteng:**
- 8.1.1. The allegation that PRASA improperly extended the scope of a tender awarded to Siyangena Technologies for the supply and installation of high speed passenger gates at Doornfontein station to a national scope is substantiated. However, the total amount of the contract was R1.95 billion and not R800 million as alleged.
- 8.1.2. The scope of a tender for high speed passenger gates advertised for two train stations, Doornfontein and Nasrec in Gauteng was awarded by the PRASA Board to Siyangena Technologies, and later extended to cover additional stations, on the basis of a closed bidding process with those that had bid for the two Gauteng stations.
- 8.1.3. The extension of the tender scope beyond what had been advertised was in contravention of paragraph 11.3.2 of PRASA SCM Policy, section 38 of the PFMA, PPPFA and section 217 of the Constitution requiring fair, equitable, transparent, competitive and cost-effective bidding processes.
- 8.1.4. The extension of Siyangena Technologies' contract to more stations than were specified in the tender advertisement accordingly constitutes maladministration and improper conduct.

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**8.2. Regarding PRASA's alleged improper extension of a tender awarded to Siemens for the Dark Fibre and Integrated Communication Systems amounting to R800 million to additional stations nationally, during the financial year 2009/2010 when it was only advertised in Gauteng:**

- 8.2.1. The allegation that PRASA improperly extended the scope and value of a tender awarded to Siemens for Dark Fibre and Integrated Communication Systems beyond what was advertised and approved by the Corporate Tender Procurement Committee (CTPC) with the effect of substantially increasing the contract price is substantiated. However, the total contract amount was R256 million and not R800 million as alleged.
- 8.2.2. PRASA improperly extended, to the Durban (KZN) and Western Cape regions, a tender for the design, supply and installation of the Dark Fibre and Integrated Communication Systems, which had been advertised and won by Siemens for the Wits and Pretoria region, without following an open and competitive tender process. This was in contravention of paragraph 11.3.7. of PRASA SCM Policy and section 217 of the Constitution, among others.
- 8.2.3. The extension of the scope and price of the design, supply and installation of the Dark Fibre and Integrated Communication Systems tender to other regions accordingly constitutes maladministration and improper conduct.

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**8.3. Regarding PRASA's alleged improper termination of all contracts for cleaning services and subsequent irregular appointment of Reakgona Commercial and Industry Hygiene and Katanga Cleaning Services:**

- 8.3.1. The allegation that PRASA improperly terminated the contracts of seven (7) cleaning companies and improperly replaced them with Reakgona Commercial and Industry Hygiene (Reakgona) and Katanga Cleaning Services (Katanga), is substantiated.
- 8.3.2. The contracts of 7 cleaning companies were summarily terminated by Mr Montana on 14 March 2012 in contravention of paragraph 13.1 of the contracts between PRASA and the cleaning companies, which prescribes a 48 hour notice to be given to the defaulting party to remedy a breach. He replaced them with Reakgona and Katanga on 15 March 2015, whose services were procured without a transparent and competitive process.
- 8.3.3. The conduct of Mr. Montana with regard to the summary termination of the contracts of 7 cleaning companies is also inconsistent with the provisions of the PRASA SCM Policy, the PFMA, PPPFA and section 217 of the Constitution.
- 8.3.4. PRASA's summary termination of the contracts of 7 cleaning companies and their irregular replacement with Reakgona and Katanga, accordingly constitutes maladministration, abuse of power and improper conduct.
- 8.3.5. The failure by Mr Montana to afford the 7 cleaning companies an opportunity to explain themselves and possibly remedy the breach cannot be considered to be in line with section 33 of the Constitution and the provisions of PAJA.

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**8.4. Regarding PRASA's alleged improper appointment of Sidas Security on a security tender in replacement of National Force Security on the GCEO's instruction:**

8.4.1. The allegation that Sidas Security was improperly appointed to replace National Force Security is substantiated. However, no evidence could be found to prove that the improper appointment was done on Mr Montana's instructions.

8.4.2. The month to month contract of National Force Security was terminated on 15 April 2009 and awarded to Sidas Security for **R3 711 197.72**, by Mr Chris Moloji without a tender process or competitive quotations being sought.

8.4.3. The appointment was in contravention of paragraph 11.3.5 of the PRASA SCM Policy and paragraph 4.7.5.1 of the National Treasury SCM Guidelines of 2004.

8.4.4. PRASA's failure to take action against the authorised official, who approved the submission for the appointment of Sidas Security, constitutes maladministration and improper conduct.

**8.5. Regarding PRASA's alleged improper appointment of Sidas Security on a security tender in replacement of National Force Security on the GCEO's instruction:**

8.5.1. The allegation that Sidas Security was improperly appointed to replace National Force Security is substantiated. However, no evidence could be found to prove that the improper appointment was done on Mr Montana's instructions.

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- 8.5.2. The month to month contract of National Force Security was terminated on 15 April 2009 and awarded to Sidas Security for **R3 711 197.72**, by Mr Chris Moloji without a tender process or competitive quotations being sought.
- 8.5.3. The appointment was in contravention of paragraph 11.3.5 of the PRASA SCM Policy and paragraph 4.7.5.1 of the National Treasury SCM Guidelines of 2004.
- 8.5.4. PRASA's failure to take action against the authorised official, who approved the submission for the appointment of Sidas Security, constitutes maladministration and improper conduct.
- 8.6. Regarding PRASA's alleged improper appointment of Vimtsire Security Services, which failed to meet the minimum requirements for appointment on tender number 525/2010/GAU/PS:**
- 8.6.1. The allegation that Vimtsire Security Services was improperly appointed while not meeting the requirements is substantiated.
- 8.6.2. PRASA appointed Vimtsire Security Services on two contracts for tender 525/2010/GAU/PS without an advertisement or competitive quotations. The first contract was signed on 23 February 2010 without specifying the period of the contract for an amount of **R4 596 480.00** and the second contract was signed on 29 May 2010 for the period 13 March 2010 to 13 August 2010 for the amount of **R7 537 680.00**. The contract was further extended by PRASA from 1 January 2011 to 31 December 2011 for an amount of **R14 441 976.00**, without a competitive process.

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- 8.6.3. The appointment and extension of the contract of Vimtsire Security amounting to **R26 576 136 00.00** were unlawful, in contravention of paragraph 11.3.1 of the PRASA SCM Policy read with the Delegation of Authority, section 217 of the Constitution, among others.
- 8.6.4. The conduct of PRASA in appointing and extending the contract of Vimtsire Security Services irregularly accordingly constitutes maladministration and improper conduct.
- 8.7. Regarding PRASA's alleged improper appointment and payment of Royal Security for an amount of R2.8 million for security services:**
- 8.7.1. The allegation that Royal Security was paid **R2.8 million** instead of **R2.5 million** stipulated in the contracts, was not substantiated.
- 8.7.2. Documentary evidence shows that the amount paid by PRASA to Royal Security was **R2.5 million**.
- 8.8. Regarding PRASA's alleged improper advance payment of R600.000.00 to Enlightened Security:**
- 8.8.1. The allegation that Enlightened Security was irregularly given an advance payment of about **R600.000.00** is substantiated.
- 8.8.2. PRASA made a first payment of **R684.720.00** to Enlightened Security for security services at Mabopane station on 22 October 2008 which was preceded by an invoice dated 19 September 2008 before the signing of the contract and the issuing of a Notice to Proceed, which followed on 17 October 2008.

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- 8.8.3. Mr Joe Ngcobo's conduct in making advance payments to Enlightened Security accordingly constitutes maladministration and improper conduct.
- 8.8.4. PRASA management became aware of this violation but took no disciplinary steps against the manager responsible, Mr Joe Ngcobo, despite initially commencing a disciplinary process. This conduct is in violation of the accounting officer's responsibility under section 38 of the PFMA and is accordingly irregular and constitutes maladministration and improper conduct.
- 8.9. Regarding PRASA's alleged improper appointment of a media company to produce *Hambanathi* Magazine during 2008/2009:**
- 8.9.1. The allegation that PRASA improperly appointed a media company to produce *Hambanathi* is substantiated.
- 8.9.2. PRASA entered into a contract (referred by it as a partnership) with KG Media providing for the publication and distribution of PRASA information to its commuters and stakeholders, through *Kwela Express*, which used to be a corporate magazine of Metrorail (subsidiary of PRASA, using the name *Hambanathi* when Mr Pule Mabe, the then owner of *Kwela Express*, was employed there).
- 8.9.3. The contract was from 1 April 2012 to 1 April 2015 (a period of 3 years) for the amount of **R465 669.75** per month which translates to **R5 588 000.37** per annum and a total contract amount of **R16 764 111.00** without a competitive and transparent bid process. Mr Montana extended the contract in March 2015 for a further 3 years **R16 764 111.00** despite a forewarning through a notice

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issued in terms of section 7(9) of the Public Protector Act, that the arrangement was likely to be determined to be unlawful. Effectively, PRASA is renting space on *Hambanathi/Kwela* for the price of about R465 669.75 a month.

- 8.9.4. Considering the fact that PRASA created *Hambanathi/Kwela* and simply failed to register it as a patent, I find the arrangement with Mr Mabe's company, KG Media, rather bizarre.
- 8.9.5. The appointment of KG Media, without a competitive process did not comply with requirements for single sourcing or any of the permissible procurement processes prescribed in the PRASA SCM Policy as production of a corporate newsletter is not an exclusive skills area or product for KG Media and paragraph 11.3.3 of the PRASA SCM Policy prohibits unsolicited bids.
- 8.9.6. PRASA's appointment and extension of the contracts with KG Media for the *Hambanathi* totalling an amount of **R33 528 222.00** is unlawful, a flagrant contravention of PRASA's own SCM Policy, Treasury Regulations, the PFMA and section 217 of the Constitution and constitutes maladministration and improper conduct.
- 8.9.7. Mr Montana's recent extension of the *Hambanathi* contract while being aware contract of an impending finding of maladministration regarding the *Hambanathi* while having asked for time extension to respond to the section 7(9) notice, is an act of bad faith, which is inconsistent with his responsibilities under section 195 of the Constitution, requiring a high standard of professional ethics and, which, according to the Constitutional Court, in *Khumalo versus MEC for Education KwaZulu Natal*, imposes a duty on him to correct an irregularity once his attention has been drawn to it. His actions in this regard, constitute gross

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maladministration and improper conduct. Such conduct is not only unlawful but also displays disconcerting disregard for the rule of law.

**8.10. Regarding PRASA's alleged improper appointment of Mr Ezra Ndwandwe, on a Change Management Consultancy at a cost of R2 million in 2008/2009:**

8.10.1. The allegation that Mr Montana improperly appointed Mr. Ezra Ndwandwe, is substantiated. However, it is the Consultancy and not the person that was appointed and the amount involved was R10 833. 774. 00 for 12 months.

8.10.2. Ndwandwe Consultancy was appointed by Mr. Montana for the Value Creation and Culture Change process at PRASA on 14 June 2008 for the amount of R6 220 800.00 without requiring three quotations from suppliers in the PRASA database as prescribed in paragraph 11.3.1.1 of the PRASA SCM Policy. The contract was extended for a further 6 months with the contract amount variation of R4 612 974.00 exceeding 40%.

8.10.3. The appointment of Ndwandwe Consultancy by Mr Montana was unlawful, in contravention of PRASA's own SCM Policy, Treasury Regulations on procurements, the PFMA and section 217 of the Constitution and accordingly constitutes improper conduct and maladministration.

8.10.4. From the evidence it is clear that Mr Ndwandwe's consultancy's appointment was triggered by an existing relationship, which had included an excursion that took place immediately before the impugned contract was initiated. It is also clear that no process was followed to establish if any other agency offered similar services. More importantly, no demand management exercise preceded the engagement. Unfortunately, the investigation did not examine what the

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excursion mentioned in the procurement memorandum dated 16 September 2008 was for, whether or not PRASA paid for it and how Mr Ndwandwe's consultancy had been procured it as the impugned engagement apparently flows from that excursion. This constitutes improper conduct and maladministration.

**8.11. Regarding PRASA's alleged improper increase of the scope and value of a marketing and communications tender number HO/M&C/305/07/2009 awarded to Brand Leadership:**

8.11.1. The allegation that PRASA improperly increased the scope and price of a marketing and communications tender awarded to Brand Leadership, is substantiated. However the tender price and price variation amount were actually higher than alleged.

8.11.2. The scope of a tender recommended by the PRASA Bid Adjudicated Committee (BAC) at the value of R12.000.000.00 was increased beyond the advertised scope to R29. 528. 000.00 by PRASA's CTPC, when it awarded it without the Accounting Officer's approval. The project timeline was also stretched, by an additional 6 months, from September 2009 to October 2009, to March 2010, which amounts to "scope creep".

8.11.3. In increasing the scope and price of the advertising tender in excess of what was advertised and without approval by the GCEO, the conduct of the PRASA CTPC was in contravention of the PRASA SCM Policy, National Treasury SCM Guidelines 5.16.1.1.1 of 2004 setting out a proper process for demand management and the process to be followed in extending the scope of a

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contract. The conduct of PRASA was improper and constitutes maladministration.

**8.12. Regarding the GCEO's alleged improper appointment of Mr Edwin Lekota on a tender amounting to R10 million for the development of a Contingency Emergency Preparedness Programme for Metrorail:**

8.12.1. The allegation that PRASA improperly appointed Mr Edwin Lekota on a tender is substantiated.

8.12.2. Mr Lekota's Lekga Investment Holdings, was appointed directly by PRASA for the ISO 9001: 2000 compliance work without a competitive process.

8.12.3. I am unable to accept Mr Montana's submission that the appointment of Mr Edwin Lekota, former CEO of SARCC, the predecessor of PRASA on a panel with, Dr Chris Dutton and Mr Friedel Mulke as part of the Board of Inquiry in terms of his powers. The evidence shows that Carundell was indeed awarded a contract to deal with the emergency arising from the burning of trains in Soshanguve, City of Tshwane, Gauteng. The same evidence shows that Mr Lekota was subcontracted by Carundel to deal with the burning of the trains.

8.12.4. However, I am encouraged by Mr Montana's undertaking in his response to the provisional findings, to ensure that such experts are, in future, invited to be part of an existing panel of experts in the PRASA database.

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**8.13. Regarding PRASA's alleged improper award of a tender to Umjanji Consortium, for the media, advertising and broadcasting concession agreement:**

8.13.1. I have deferred my findings on this complaint as PRASA is yet to submit some of the bid documents, key being the tender documents submitted by Umjanji Consortium, which need to be subjected to a forensic examination. Evidence uncovered so far confirms that:

8.13.2. On 31 January 2011, Mr Montana awarded the Media and Broadcasting Services tender HO/CA739/02/2010 to Umjanji Consortium, an entity led by Provantage Media, which is apparently the only constituent part of Umjanji Consortium that attended the compulsory briefing session for the tender on 22 February, 2010.

8.13.3. Umjanji Consortium was not in existence at the time of closure of the tender on 11 March 2010.

**8.14. Regarding the GCEO's alleged improper awarding of a contract for the provision of professional advisory service on the signalling project to a friend, Mr Makhensa Mabunda of Siyaya DB**

8.14.1. No evidence was found substantiating that Mr Mabunda was or is Mr Montana's friend and that such friendship informed his company's appointment.

8.14.2. Mr Montana did appoint Siyaya DB, which scored slightly lower than Mott Macdonald, on tender HO/INF/203/06/2010 for rendering of technical

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assistance and supervision for the national signalling project, following an open and competitive tender process.

8.14.3. I have accepted these reasons given being that the highest bidder failed to meet PRSASA's requirements relating to pricing certainty and BEEE compliance as both cogent and rational

8.14.4. I am accordingly unable to find that the award of the tender to Siyaya DB by Mr Montana and/ or PRASA constitutes maladministration or improper conduct.

**8.15. Regarding PRASA's alleged improper awarding of a tender in the amount of R22 million for Park Station Development Framework to ARUP, a company associated with its board member.**

8.15.1. The allegation that ARUP was improperly awarded a tender for the Park Station Development Framework is substantiated. However, the amount involved was much less than the alleged R22 million, it was R3 898 940.00 which did not require Board approval.

8.15.2. PRASA conceded that a proper procurement process was not followed in the appointment of ARUP and took action against the persons implicated in the appointment concerned.

8.15.3. I accordingly do not see the need to make a finding of maladministration or improper conduct. The aspect relating to a board member's alleged involvement is addressed separately.

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**8.16. Regarding PRASA's alleged failure to investigate the theft of buses of its subsidiary, Autopax:**

8.16.1. The allegation that PRASA improperly failed to investigate the theft of buses of its subsidiary, Autopax, is not substantiated.

8.16.2. Records show that PRASA conducted an investigation and internal disciplinary hearings regarding the theft of the Autopax buses leading into the suspension of one employee and dismissal of another. Furthermore, cases were registered with the SAPS in respect of the theft of the buses and there were regular follow up activities.

**8.17. Regarding PRASA's alleged improper awarding of a security services contract to Futuris Guarding in April 2010 at Autopax City to City for a total amount of R231 204.00:**

8.17.1. The allegation that Futuris Guarding was improperly appointed is substantiated. However, the amount involved was higher than alleged as it was about R10.6 million for a six month contract.

8.17.2. Although security unarguably involves danger as envisaged in urgency provisions of paragraph 11.3.5 of the PRASA SCM Policy, the implementation of urgency procurement failed to comply with the procedure laid out in the PRASA SCM policy in that the deviation was not ratified and approved by the GCEO, a deviation I consider material.

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- 8.17.3. The actions of Mr Joe Buthelezi, Acting Supply Chain Manager in the appointment of Futuris Guarding on a security contract on confinement, without the GCEOs approval constitutes maladministration and improper conduct.
- 8.17.4. PRASA's failure to take disciplinary action Mr Buthelezi for the appointment of Futuris Guarding constitutes improper conduct and maladministration.
- 8.18. Regarding PRASA's alleged improper termination of the Rasakanya Builders contract on 1 November 2012:**
- 8.18.1. The allegation that PRASA improperly terminated the contract of Rasakanya Builders is not substantiated.
- 8.18.2. PRASA terminated its month to month contract with Rasakanya Builders on 28September 2012, with effect from 01november, 2012, giving it a month's notice.
- 8.18.3. I could not find any impropriety with the termination and accordingly am unable to find that PRASA's conduct constitutes maladministration or improper conduct.
- 8.19. Regarding the GCEO/PRASA's alleged improper implementation of an advance payment in the amount of R 80 million for the FIFA World Cup sponsorship without proper approval, budget and/or allocated funds thus constituting to fruitless and wasteful expenditure:**
- 8.19.1. The allegation that PRASA made an advance payment in the amount of R80 million to FIFA without proper approval, budget or allocated funds which resulted in fruitless and wasteful expenditure is not substantiated.

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**8.20. Regarding PRASA's alleged improper incurring of an over expenditure of R2.2 billion on PRASA's operations budget in 2009/2010 financial year:**

8.20.1. The allegation that PRASA improperly incurred an over expenditure is substantiated. However, the amount involved was far less than alleged. It was R523 792 767.00

8.20.2. PRASA exceeded its budget by R523 792 767.00 for the 2009/2010 financial year.

**8.21. Regarding PRASA's alleged failure to spend a subsidy of R500 million received for Shosholozza Meyl for the 2009/2010 period and not use it for its intended purpose:**

8.21.1. The allegation that PRASA failed to spend the subsidy received for Shosholozza Meyl for 2009/2010 financial year is not substantiated.

8.21.2. PRASA received a government subsidy of R450.00.00 for the year 2009/10 for Shosholozza Meyl.

8.21.3. I am unable to confirm if the subsidy was indeed used for its intended purpose as the operational expenditure for Shosholozza Meyl was not reflected separately in the overall budget of PRASA.

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**8.22. Regarding PRASA's alleged incurring of rental expenditure for Jorissen Building after vacating it 20 months before the expiry of its lease resulting in fruitless and wasteful expenditure:**

8.22.1. The allegation that PRASA improperly incurred rental expenditure which constitutes fruitless and wasteful expenditure due to vacating of the Jorissen Building before the expiry of its lease agreement is substantiated.

8.22.2. On the authority of Mr Montana, PRASA (SARCC) paid rental for a vacant office property number 66 Jorissen Street, Braamfontein, Johannesburg, for 20 months after vacating it prior to the expiry of its lease agreement and without exercising its option of subletting.

8.22.3. The hasty vacation of Jorissen's Place Building resulting in continued full payment of rent for unused lettable space for 20 months. This cannot be consistent with the efficiency and cost effective dictates expected in state affairs under section 195 of the Constitution and the standards set for proper handling of public funds under the PFMA, particularly section 51 thereof.

8.22.4. The actions of PRASA management and its Board regarding the move to Umjantshi House and payment for vacant premises, for about 20 months and failing to mitigate the loss by subletting the premises, amounts to fruitless and wasteful expenditure.

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**8.23. Regarding PRASA's alleged improper incurring of rental expenditure on Intersite Building after vacating the building 10 months before the expiry of its lease resulting in fruitless and wasteful expenditure:**

8.23.1. The allegation that PRASA improperly incurred rental expenditure and the consequent fruitless and wasteful expenditure, due to vacating Intersite Building before the expiry of its lease, is substantiated.

8.23.2. PRASA vacated the Intersite building about 10 months before the lease expiry date and continued with rental payments for the building for the vacant building until the expiry of the lease.

8.23.3. The conduct of PRASA accordingly constitutes maladministration and improper conduct.

**8.24. Regarding the GCEO's improper termination of contracts of Executives resulting in fruitless and wasteful expenditure amounting to an estimated R5 million:**

8.24.1. The allegation that Mr Montana improperly terminated the services of 5 of its Executives mentioned in paragraph 6.27.2.1 of this report is substantiated.

8.24.2. Mr Montana terminated the services of five Executives during 2008-2013 without following proper procedure as provided for in paragraph 4.4 of PRASA's Disciplinary Code and Procedure. This resulted in the CCMA overturning some of the terminations and others being settled out of court at cost to PRASA.

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- 8.24.3. PRASA subsequently paid labour dispute settlements amounting to R3 816 735.32, principally due to procedural irregularities in the disciplinary steps taken against involved officials, which payments can be said to constitute fruitless and wasteful expenditure as envisaged in section 38(1)(c) (ii) of the PFMA.
- 8.24.4. Failure by PRASA to follow its corporate disciplinary procedures and labour laws relating to procedural fairness constitutes maladministration and improper conduct.
- 8.25. Regarding the GCEO's alleged improper suspension of employees resulting in labour dispute settlements amounting to R3.35 million thus constituting fruitless and wasteful expenditure:**
- 8.25.1. The allegation that the GCEO suspended employees without following proper disciplinary procedures is substantiated in respect of some of the employees as others were not suspended by him.
- 8.25.2. PRASA suspended 7 employees without following proper procedure as provided for in the Labour Relations Act and paragraph 11 of its Disciplinary Code and Procedure, leading to loss of approximately of R2 million in wages during their suspension period.
- 8.25.3. The case studies regarding the seven (7) officials mentioned in paragraph 6.28.2.3 of the report support the conclusion of a pattern of habitual suspensions for periods exceeding thirty (30) days without following proper procedure.

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- 8.25.4. The conduct of PRASA in habitually suspending employees was in contravention of paragraph 11.1 of its Disciplinary Code and Procedure which provides that the employer has the right to suspend an employee with pay for a period not exceeding thirty (30) calendar days and also in contravention of paragraph 4.4 of PRASA Disciplinary Code and Procedure and Schedule 1 Part VII of the Basic Conditions of Employment Act which provides that employment practices shall ensure employment fairness.
- 8.25.5. It is not unreasonable to draw a nexus between the payment of salaries for staff sitting at home with pay for long periods of time and failure to manage employment relations appropriately, and the conclusion that the payment of salaries without any value derived therefrom is irregular and constitutes fruitless and wasteful expenditure.
- 8.25.6. PRASA's conduct in this regard amounts to fruitless and wasteful expenditure in contravention of the provisions of section 38(1) (c) (ii) read with section 51 (b) (ii) of the PFMA while being at odds with the financial prudence and efficiency requirements of section 195 of the Constitution.
- 8.25.7. The conduct of PRASA regarding improper suspension of employees accordingly constitutes maladministration and improper conduct.

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**8.26. Regarding PRASA Board Chairman, Mr Sfiso Buthelezi's alleged failure to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory services to PRASA on the Rolling Stock Programme:**

8.26.1. The evidence regarding the allegation that Mr Buthelezi, former Chairman of the PRASA Board, improperly failed to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company alleged to be providing advisory services to PRASA is inconclusive.

8.26.2. The documents have not been provided by PRASA, whose GCEO only offered an explanation disputing the allegation and providing the names of companies involved in the said advisory services.

8.26.3. Accordingly, I have deferred my findings on this allegation and will be dealt with in the second report.

**8.27. Regarding Dr Bridgette Gasa's, a PRASA Board member's alleged failure to disclose and manage a conflict of interest arising from her interest in ARUP and her directorship in another company providing consultancy services to PRASA:**

8.27.1. The allegation that the then PRASA Board Member, Dr Bridgette Gasa, failed to disclose and manage a conflict of interest arising from her appointment to the Board while two companies she had an interest in provided services to PRASA, is not substantiated.

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- 8.27.2. Whilst Dr Gasa was indeed a Director at ARUP from 09 February 2011, she made the necessary disclosure to PRASA on 20 July 2011, resigned on 15 May 2012 and when making her disclosure on 10 October 2012, excluded ARUP, as she no longer was a board member.
- 8.27.3. ARUP SA (Pty) Ltd was indeed awarded a contract by PRASA for the Park Station Development Framework on 21 June 2011; however the contract was for R3.8 million which would not have required Board approval.
- 8.28. Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, wife of then Board Member, Mr. Bushy Boshielo, as the General Manager of Autopax:**
- 8.28.1. I have deferred my finding on the alleged nepotism regarding the appointment of Ms Boshielo as PRASA has failed to provide the selection and appointment memoranda and some of the relevant documents.
- 8.28.2. In its initial response Mr Montana stated on behalf of PRASA that Ms Boshielo was appointed on 06 April 2010 through a headhunting process. Later, in response to the provisional findings, Mr Montana turned around to state that the submission was a mistake as Ms Boshielo was appointed through a recruitment and selection process and was selected from amongst other candidates but repeatedly failed to honour requests to provide the recruitment and selection documents to substantiate the assertion.

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**8.29. Regarding the GCEO's alleged improper appointment of Mr Joel Chimanda at a cost of R2 million as a Special Advisor:**

- 8.29.1. The allegation that Mr. Montana improperly appointed Mr Chimanda for advisory services is substantiated.
- 8.29.2. However, it was Mr. Chimanda's company, AR Chimanda Consulting that was contracted for R1 999.750.00 on a monthly retainer of R150 000.00, which makes the appointment a procurement contract and not an employment contract. As juristic person cannot be an employee, the contract is incapable of being defended under the GCEO's powers to appoint special advisors, as attempted by Mr Montana in his submissions.
- 8.29.3. The appointment of Mr. Chimanda's company was not preceded by a competitive bid process, nor is he offering exclusive specialised services entitling him to be the sole provider in terms of the provisions of the PRASA SCM Policy
- 8.29.4. The conduct of Mr Montana, in appointing AR Chimanada Consulting, is accordingly in contravention of the SCM policy, the PFMA, PPPFA aand sction 217 of the Constitution.
- 8.29.5. The conduct of Mr Montana accordingly constitutes maladministration and improper conduct.

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**8.30. Regarding PRASA's alleged improper replacement of the Group Executive HR with the GCEO's uncle, Mr Mphefo Ramutloa, without following proper recruitment process:**

8.30.1. The allegation that Mr. Mphefo Ramutloa was improperly appointed in replacement of Group Executive HR by PRASA is not substantiated.

8.30.2. No evidence could be found to support the allegation that Mr. Mphefo Ramutloa is Mr Montana's uncle.

**8.31. Regarding PRASA's alleged failure to take disciplinary action against staff members allegedly involved in fraudulent Electronic Funds Transfers amounting to R8.1 million:**

8.31.1. The allegation that PRASA failed to take disciplinary action against employees involved in the fraudulent electronic financial transfers of its funds, from its corporate bank accounts, is partially substantiated.

8.31.2. Action was taken against one of the six (6) employees found responsible by a Deloitte forensic investigation, for security lapses that led to the fraudulent electronic transfer of PRASA funds amounting to R8.1million in its KwaZulu Natal and Gauteng bank accounts.

8.31.3. PRASA took action against Ms Pallaiyiah but inexplicably failed to take disciplinary action against the other six individuals recommended for possible disciplinary action as mentioned in paragraph 13.3 of the Deloitte Report of 26 February 2010.

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- 8.31.4. The conduct of Mr Montana regarding failure to take disciplinary action against the other five (5) employees constitutes maladministration and improper conduct.
- 8.32. Regarding Mr Montana's alleged improper taking of a Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000 and possible fruitless and wasteful expenditure:**
- 8.32.1. The evidence regarding this issue is inconclusive. While the photographic evidence received from the Complainant apparently places Mr Montana on the train and a hotel with women companions, he he has denied the allegation but referred to a different trip.
- 8.32.2. I have deferred my finding on this allegation and will be dealt with in the second report.
- 8.32.3. Regarding Mr Montana's alleged improper transferring of Mr Stephen Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disability:
- 8.32.4. I have deferred my finding on the alleged failure by Mr Montana to take disciplinary action against Mr Stephen Ngobeni as PRASA has failed to provide the necessary documents relating to the issue.
- 8.32.5. No evidence was found in support of the allegation that Mr Ngobeni is Mr Montana's cousin.

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8.32.6. I have deferred my findings on this allegation and will be dealt with in the second report.

**8.33. General observations**

8.33.1. The transactions investigated and related findings reveal a culture of systemic failure to comply with the SCM policy, particularly involving failure to plan for bulk procurement, test the market appropriately for competitive pricing and to manage contracts, which culture may have cost PRASA millions in avoidable expenditure and preventable disruption of services.

8.33.2. There also seems to be a culture of either poor information management or hiding of information that could provide evidence of maladministration and other forms of improper conduct. If the pattern is not arrested it has the potential to derail the effective and efficient procurement of goods and services to support PRASA operations and consequently service delivery by this important national asset. Poor financial management also has implications for the national revenue as it may mean frequent yet preventable rescue funding.

8.33.3. Regarding PRASA's failure to provide information, it must be appreciated that public accountability via administrative bodies such as the Public Protector is not accountable to Complainants but to the public that entrusts public functionaries with public power and resources. It is, accordingly, not open to public functionaries to try and win a case by withholding or hiding information.

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## 9. REMEDIAL ACTION

The appropriate remedial action I am taking in pursuit of section 182(1)(c) of the Constitution, with a view of placing the Complainant as close as possible to where they would have been had the improper conduct or maladministration not occurred, while addressing systemic procurement management deficiencies in PRASA, is the following:

### 9.1. The Minister of Transport to:

- 9.1.1 Take cognizance of the findings regarding the unethical conduct and maladministration by PRASA relating to the irregularities mentioned in the report.
- 9.1.2 Ensure that the PRASA Board considers the report and, where appropriate, acts in terms of section 84 and as contemplated in section 85 of the PFMA.
- 9.1.3 Ensure that the PRASA Board considers the acts of maladministration and improper conduct referred to in paragraph 8 of this report and takes appropriate disciplinary action against the officials of PRASA in respect of their conduct referred to therein.
- 9.1.4 Include in her oversight activities with regard to PRASA as a State Owned Enterprise, the monitoring of implementation of remedial action taken in pursuit of the findings in terms of powers conferred under section 182(1)(c) of the Constitution.

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**9.2. The Chairman of PRASA Board to ensure that:**

- 9.2.1. The PRASA Board takes cognizance of the findings of maladministration and improper conduct by Mr Montana and other functionaries at PRASA and takes or ensures that appropriate disciplinary action is taken against the responsible officials, where it considers appropriate.
- 9.2.2. The PRASA Board evaluates the effectiveness of PRASA's internal controls on SCM and HR processes with a view to take corrective action to prevent a recurrence of the improprieties referred to in this report.
- 9.2.3. PRASA Board considers amending the R350 million threshold value of its SCM Policy for competitive bidding process of procurement of goods and services.
- 9.2.4. The PRASA Board reports to the National Treasury and the Auditor-General, particulars of the alleged financial misconduct and the steps taken in connection with such financial misconduct, as contemplated in section 85 of the PFMA.
- 9.2.5. To support National Treasury in conducting a forensic investigation into all PRASA contracts above R10 million since 2012 and take measures to address any findings regarding systemic administrative deficiencies allowing maladministration and related improprieties in its procurement system.

**9.3. The Acting GCEO of PRASA:**

- 9.3.1. PRASA should adopt a monitoring system that ensures that proper procurement processes and HR processes are followed on appointing service providers and individuals.

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- 9.3.2. Review the existing policy or the policy provisions on managing conflict of interest to ensure there is no confusion regarding expectations from employees and Board Members.
- 9.3.3. Together with the National Treasury, commission a forensic investigation into all PRASA contracts above R10 million since 2012 and take measures to address any findings regarding systemic administrative deficiencies allowing maladministration and related improprieties in its procurement system.
- 9.3.4. Together with the Board, review the entire PRASA SCM Policy in particular clause 11.3 of the policy.
- 9.3.5. To ensure that prior to signing a formal contract or service level agreement with a contractor must ensure that such contracts or agreements are legally sound to avoid potential litigation and to minimise possible fraud and corruption. This must include legal vetting by at least the Legal Services of the agency. Such contracts or agreements must be actively managed in order to ensure that both the agency and the contractors meet their respective obligations.
- 9.3.6. To ensure that there is compliance with paragraph 11.1 of the Disciplinary Code and Procedure of Metrorail to avoid prolonged and costly suspensions of employees.
- 9.4. The Chief Procurement Officer of the National Treasury:**
- 9.4.1. To conduct a forensic investigation into all PRASA contracts above R10 million since 2012.

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- 9.4.2. The terms of reference to be approved by the Public Protector.
  - 9.4.3. The Public Protector to be kept abreast of the progress of the investigation.

## **10. MONITORING**

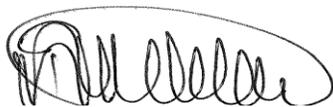
- 10.1.1. The Minister of Transport to submit an implementation plan indicating how the remedial action referred to in paragraph 9.1 above will be implemented, within 30 days from the date of my final report.
- 10.1.2. The Chairman of the PRASA Board to submit an implementation plan indicating how the remedial action referred to in paragraph 9.2 above will be implemented, within 30 days from the date of my final report.
- 10.1.3. The Acting GCEO of PRASA to submit an implementation plan indicating how the remedial action referred to in paragraph 9.3 above will be implemented, within 30 days from the date of my final report.
- 10.1.4. The Chief Procurement Officer of the National Treasury to submit an implementation plan indicating how the remedial action referred to in paragraph 9.4 above will be implemented, within 30 days from the date of my final report.

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10.1.5. All actions requested in my report as part of the remedial action I have taken in terms of my powers under section 182(1) (c) of the Constitution to be finalised within six months and a final report presented to my office.

*"The principle of legality is applicable in all exercises of public power and not only in administrative action" as defined in PAJA. It requires that all exercises of public power are, at minimum, lawful and rational.*

Justice Skweyiya in *Khumalo and Another v Member of the Executive Council for Education: KwaZulu Natal* (CCT 10/13) [2013] ZACC 49



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**ADV T N MADONSELA**

**PUBLIC PROTECTOR OF THE  
REPUBLIC OF SOUTH AFRICA**

**DATE: 24 August 2015**

*Assisted by: Governance and Integrity Branch*