



**#UNITE
BEHIND**
A JUST AND EQUAL SOCIETY

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31 Aug. 22

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Dear Speaker Mapisa-Nqakula, Adv. Gordon and Co-Chairpersons Moshodi and Nkosi,

RE: Complaint to Joint Committee on Ethics and Members' Interests

President Ramaphosa has stated and advised you in a letter dated 24 June that Parliament must not wait for him to produce a plan to implement the recommendations from the recently published Commission of Enquiry into Allegations of State Capture Report ("The State Capture Report"). It is compelled to "engage in its own process on the recommendations that affect it directly."¹

Part V Vol II of the State Capture Report has highlighted many instances of corruption, maladministration and failing to uphold the public interest in the operations of the Passenger Rail Agency of South Africa (PRASA). To quote from the Report:

The term political malpractice has recently been coined. Given the extent to which certain public representatives failed to exercise their power, and the resultant massive losses to the fiscus and the suffering cause[d] to vulnerable members of the public, in respect of PRASA-related matters, and the premium that the Constitution places on accountability, perhaps it is time for South Africa to ensure that it[s] public representatives fulfil their obligations by introducing a form of sanction for what may be termed constitutional and political malpractice.²

Many of the persons implicated in the State Capture Report and those dealing with oversight of PRASA are currently Members of Parliament in various key roles. We request you to consider several current Members' involvement in allowing or promoting PRASA's "slide into almost total ruin"³ and summon them before the Joint Committee on Ethics and Members' Interests, in terms of Rule 32 of the Joint Rules of Parliament and/or institute proceedings in terms of art. 10 of Parliament's Code of Conduct. Further, we request that you to take disciplinary actions against the Members implicated, below, and suspend or expel them from serving as members of Parliament. This is necessary for the "premium that the Constitution places on accountability" to be upheld and for the identified constitutional and political malpractice to be arrested.

What follows is a signed affidavit, forming our complaint in terms of art. 10.2.2.2. of the Code of Conduct. We are available for oral or written communications if elaboration or explanation of complaints is required. We look forward to hearing from you on the status of our complaint

Yours sincerely,



Zackie Achmat



Zukiswa Vuka



Lederle Bosch



Joseph Mayson

¹ Emsie Ferreira. 04 July 2022. "Ramaphosa tells parliament to act on Zondo's findings on the State Security Agency." *Mail & Guardian*. Online: <https://mg.co.za/politics/2022-07-04-ramaphosa-tells-parliament-to-act-on-zondos-findings-on-the-state-security-agency/>

² The State Capture Report Part V Vol II, para 2180, pg. 846.

³ State Capture Report Part V Vol II, para 2194, pg. 854.

COMPLAINT

The Joint Committee on Ethics and Members' Interests

#UniteBehind

Zackie Achmat

Zukiswa Vuka Fokazi

First Complainant

Second Complainant

Third Complainant

versus

Sfiso Buthelezi

Dipuo Peters

Dikeledi Magadzi

Mkacani Joe Maswanganyi

Fikile Mbalula

Mosebenzi Zwane

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

I, the undersigned,

ABDURRAZACK "ZACKIE" ACHMAT

hereby affirm and say:



1. I am an adult male, political activist and a director of UniteBehind NPC, the applicant, whose offices are at First Floor, Methodist House, 46 Church Street, Cape Town, 8000.
2. I am duly authorised to depose to this affidavit and bring this complaint on behalf of #UniteBehind in the public interest, in the interest of commuters and in my personal capacity. In addition, this complaint is also brought by Ms Zukiswa “Vuka” Fokazi.
3. The facts contained in this affidavit are from my own personal knowledge, documentary evidence gathered by #UniteBehind, from the evidence led before the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector and Organs of State¹ (“The State Capture Report”), and, from various official investigations.
4. I have coordinated UniteBehind’s legal work relating to state capture at Passenger Rail Agency of South Africa (PRASA) since 2017.
5. The complaint is brought to Parliament and specifically the **Joint Committee on Ethics and Members’ Interests** based upon:
 - 5.1. The report of the former Public Protector, Ms Thulisile Madonsela in 2015;
 - 5.2. Investigations by the National Treasury on behalf of PRASA;
 - 5.3. Investigations by Werksmans Attorneys on behalf of PRASA;
 - 5.4. All records and judgments of the courts and other arising from state capture, corruption and fraud at PRASA;
 - 5.5. The Horwath Forensics Report produced by Mr Ryan Sacks on behalf of the Directorate of Priority Crimes Investigation (DPCI) into the Swifambo Rail Agency;
 - 5.6. The Oellerman Report prepared on behalf of the State Capture Commission into Siyangena Technologies;
 - 5.7. The affidavits, documents and oral evidence before the State Capture Commission in relation to PRASA;

¹ GG41403 25 Jan 2015, p.4

- 5.8. The final report and recommendations of the State Capture Commission and the duties of Parliament in relation to the Commission's report; and
- 5.9. #UniteBehind's work, experience and evidence in relation to the collapse of the commuter rail services; state capture, corruption, fraud, malfeasance, maladministration and mismanagement at PRASA.
6. The Parliamentary Ethics Committee and its Registrar must consider all these reports, aspects and evidence in its evaluation of our complaint.

THE PARTIES

7. The complainants include #UniteBehind, a juristic person acting in the public interest, Zackie Achmat, and Zukiswa Fokazi, political activists acting in their own capacity and on behalf of #UniteBehind. Over the last five years, the individual complainants have been integral to the political representations, public campaigns and litigation on state capture, mismanagement and maladministration at PRASA.
8. The Respondents are all members of the National Assembly, they all served or currently serve in the National Executive as Ministers or Deputy-Ministers. Most of them have also served or currently as chairpersons of various committees of Parliament.

THE COMPLAINANTS

9. **#UniteBehind** is the first complainant in this matter and a not-for-profit company dedicated to the building of a just and equal society. It is also committed to ending state capture, particularly the corruption, maladministration, mismanagement and malfeasance at the Passenger Rail Agency of South Africa (PRASA) and has built a campaign known as #FixOurTrains.
10. I am the second complainant in this matter and my direct interest is the ending of state capture at PRASA and the construction of a safe, reliable, affordable, efficient and quality public transport system, specifically, a commuter rail service.

11. **Zukiswa “Vuka” Fokazi** is the third complainant in this matter, and her direct interest includes the ending of state capture at PRASA and the construction of a safe, reliable, affordable, efficient and quality public transport system, specifically, a commuter rail service. Ms Fokazi’s affidavit will be submitted in the next few days.

THE RESPONDENTS

12. The First Respondent is **Mr Sifiso Buthelezi (MP)** who joined Parliament in 2016. Mr Buthelezi’s past positions in Parliament and the Cabinet include being a member the Standing Committee on Finance, Deputy-Minister of Finance, Deputy-Minister of Agriculture, Forests and Fisheries. He currently serves as the Chairperson of the Standing Committee on Appropriations. In addition, Mr Buthelezi is a business owner and a director of several companies, some of which benefited from corruption at PRASA.

Mr Buthelezi served as a board member of the South African Rail Commuter Corporation (PRASA’s predecessor.) In 2009, he became the first and longest serving chairperson of the PRASA Board of Control (BoC). At all material times during his tenure as BoC Chairperson at PRASA between 2009 and 2015, Mr Buthelezi was a party to the state capture, corruption, mismanagement, maladministration and malfeasance at the commuter rail agency.

13. The Second Respondent is **Ms Dipuo Peters (MP)** who currently serves as a member of the Standing Committee on Appropriations. She has served in numerous positions in government including as Premier of the Northern Cape and the Minister of Energy Affairs. Ms Peters’ most controversial tenure was her role as Minister of Transport where she unlawfully sacked the PRASA Board of Control chaired by Mr Popo Molefe. The Molefe Board was sacked because of their role in resisting state capture through investigations, civil litigation and criminal complaints. Ms Peters acted in the interest of those responsible for corruption and state capture.

14. The Third Respondent is **Ms Dikeledi Magadzi (MP)**, who currently serves as the Deputy-Minister of Water and Sanitation. Ms Magadzi held various positions as Member of the Executive of the Limpopo Provincial Government between 1994 and 2010, after which she joined the National Assembly. At all material times, when state capture, corruption, maladministration, malfeasance and mismanagement at PRASA was exposed and attempts

made to hold those accountable, Ms Magadzi almost invariably supported the culprits and failed in her duties of oversight. She was also recently Deputy-Minister of Transport.

15. The Fourth Respondent is **Mr Mkhacani Joseph Maswanganyi** who currently serves as the Chairperson of the Standing Committee on Finance. In the same way as the other Respondents, Mr Maswanganyi has served in various government positions since 2014. He has served in the Limpopo Legislature and on the Portfolio Committee on Transport in the National Assembly. Mr Maswanganyi served as Minister of Transport between 30 March 2017 to 26 February 2018. In his post as Minister of Transport, Mr Maswanganyi acted unlawfully, appointed Justice TAN Makhubele as Chairperson of an “interim” Board at PRASA, where she acted to facilitate unlawful and corrupt settlements. Mr Maswanganyi never appointed a lawful BoC at the commuter rail agency.

16. The Fifth Respondent is **Mr Fikile Mbalula (MP)**, the current Minister of Transport. Mr Mbalula has previously served in the National Executive as Minister of Sport and Recreation and Minister of Police. He has been a Member of Parliament since 2009. Minister Mbalula has failed to appoint a quorate BoC at PRASA with the requisite skills to manage a complex parastatal. He has knowingly acted arbitrarily and unlawfully as Minister of Transport and caused its BoC and executives to act unlawfully since he occupied the position. Mr Mbalula has not only acted unlawfully in relation to the governance and management of PRASA, but his conduct has also led to the wholesale destruction of commuter rail infrastructure.

17. The Sixth Respondent is **Mr Mosebenzi Zwane (MP)**, the current Chairperson of the Portfolio Committee on Transport. Mr Zwane has served in the Free State Legislature and as MEC for Agriculture. His unlawful conduct on behalf of the Gupta family in the Vrede and Estina matter has been widely covered and should have disqualified him from parliamentary membership. In addition, his notorious stint as Minister of Minerals and Energy Affairs further exposed criminal conduct on behalf of the Gupta family. As Chairperson of the Portfolio Committee of Transport, Mr Zwane has failed egregiously in his oversight of PRASA and the Minister of Transport.

STRUCTURE OF THE COMPLAINT AND EVIDENCE AVAILABLE TO THE PARLIAMENTARY ETHICS COMMITTEE

18. The complaint is structured as follows:

- 18.1. #UniteBehind's background and engagement with state capture at PRASA.
- 18.2. My personal background, work and experience as second complainant.
- 18.3. Constitutional and legal grounds for the complaint.
- 18.4. The destruction and collapse of PRASA.
- 18.5. Sifiso Buthelezi: An architect of state capture and beneficiary of corruption.
- 18.6. Dipuo Peters: Political interference as obstruction of justice.
- 18.7. Dikeledi Magadzi: Parliamentary protection for the PRASA criminal networks.
- 18.8. Mkhacani Maswanganyi: Ministerial facilitation of corrupt practices at PRASA.
- 18.9. Fikile Mbalula: Overseeing corruption and collapse at PRASA.
- 18.10. Mosebenzi Zwane: Parliamentary obstruction of justice.

19. The voluminous evidence before the Judicial Commission of Inquiry into Allegations of State Capture is available to the Joint Committee on Ethics and Members' Interests (Parliamentary Ethics Committee) and its Registrar. #UniteBehind also has a record of evidence available to the Parliamentary Ethics Committee. I am advised that the evidence gathered by #UniteBehind for this complaint and which forms the basis of this affidavit complies with the law of evidence as used in ordinary legal proceedings in our courts. Every effort is made to rely on evidence under oath, published official documents including reports, unpublished documents revealed through protected disclosure (whistle-blower) evidence; submissions to Parliament, letters, court records, judgments, WhatsApp messages, complaints to the Judicial Service Commission and the Bar Council - this evidence is largely verifiable and common cause. There may be minor disputes of fact between the parties in media reports, press statements, pamphlets and audio-visual materials. These sources, however, largely confirm what is common cause in relation official reports.

20. I have been personally and directly involved in the gathering of most of the evidence and I have studied all the documents attached to this affidavit. Alongside my colleagues and legal advisors, I have also been involved in drafting #UniteBehind reports, affidavits and letters used in this affidavit. The protected disclosures used in this affidavit were handed over to me personally or to attorneys for #UniteBehind.

21. Evidence from commuters based on their individual experience of the decline of the Passenger Rail Service Agency of South Africa (PRASA) since around the year 2000 can also be made available to the Parliamentary Ethics Committee. Commuter experiences of crime, delays, lack of communication, inadequate rolling-stock and the largely disastrous and dysfunctional state of the rail service. They are made by #UniteBehind activists who use trains or commuters that self-organised through WhatsApp Groups or Facebook.
22. The Annexures attached to this affidavit will be supplemented, along with supporting affidavits from activists, commuters, trade unions, religious leaders, and other concerned individuals and organisations. **ZA1** details the evidence on state capture, corruption, fraud, malfeasance and mismanagement at that the Parliamentary Committee on Ethics must consider.

#UNITEBEHIND BACKGROUND AND ENGAGEMENT WITH STATE CAPTURE AT PRASA

23. #UniteBehind was formed as a coalition of people's movements, legal, policy and support organisations advocating for justice and equality. Coincidentally, it emerged out of the Ahmed Kathrada Memorial Service held at St George's Cathedral in Cape Town on 6 April 2017 to protest the assault on the democratic state epitomised by the Cabinet reshuffle that saw the removal of Mr Pravin Gordhan and Mr Mcebisi Jonas from the Ministry of Finance.
24. #UniteBehind is now a non-profit company (NPC) that supports organisations and coalitions such as the Ahmed Kathrada Foundation and Defend Our Democracy. In turn, #UniteBehind is supported by various movements such as Reclaim the City, Movement for Care, Ndifuna Ukwazi, Free Gender and others.
25. One of #UniteBehind's key missions is to build a just and equal society where all people share in the country's wealth, participate in the decisions that affect their lives, and where the environment is sustainably protected for future generations
26. One of our central demands is the building of a safe, reliable, affordable, efficient and quality public transport system, in particular a commuter rail service. It seeks to achieve this by taking positive steps to end the following in respect of PRASA: the endemic corruption; its capture;

political interference by the Executive; and incompetence and maladministration. We are committed to ensuring that commuter rail services are devolved to local and provincial governments in line with the Constitution, legislation and long-standing government policy.

27. In order to achieve these difficult and important aims, we study documents dealing with state capture in general and of PRASA. We study the functioning of the rail system, relevant laws and the history of rail services. We then pass that knowledge on to activists, organisations, Government and the public. In addition, we engage with and urge those in authority to prosecute companies and individuals against whom PRASA has laid charges and, where necessary, we hold protests and pickets.
28. We have also engaged with PRASA officials, Parliament, successive Ministers of Transport, the Office of the President, the Office of the Chief Justice, and others regarding state capture at the rail agency and the mismanagement, incompetence and collapse of the rail service. These engagements have largely been frustrating, leading to meetings after meetings with unfulfilled promises by those in power.
29. #UniteBehind has used the Courts to advance our goals, in opposition to PRASA (when it has been mismanaged) and the national government, and to support PRASA (when it has been correctly managed) in its efforts to eradicate corruption and mismanagement. At every point, we work from the perspective of the commuters whose right to decent (i.e. safe, reliable, affordable, accessible, and efficient) public transport has been impeded by the crisis that has devastated the commuter rail service in South Africa.
30. In this complaint, #UniteBehind acts in its own interests, the interests of its affiliates and their members; the interests of its commuter members; and the broader rail commuting community. We also act in the name of PRASA employees and whistle-blowers who cannot act in their own interest. Finally, we act in the public interest.

MY PERSONAL BACKGROUND, WORK AND EXPERIENCE

31. In 1976, I joined the high school students' revolt and I have been a political activist and socialist since then. Over the last 44 years, my activism, experience, education and knowledge



in the spheres of politics, history, economics, law and political campaign work was enriched by mentors and many comrades.

32. I was recruited to the African National Congress (ANC) when I was 18 years old by the late Johnny Issel and Hennie Ferrus at the then-Victor Verster Prison. I was detained in solitary confinement, convicted and held under preventative detention five times as a child. I was also part of the United Democratic Front and have worked in youth and civic movements, trade unions, gay and lesbian organisations and primary health care organisations. In 1985, I joined the Marxist Workers Tendency of the ANC.
33. During the advent of democracy, I worked at the AIDS Law Project (ALP) and was a member of the South African Law Commission Working Committee on HIV/AIDS. I was one of the founders of the Treatment Action Campaign (TAC). The TAC worked with Parliament until the ANC removed its MPs who were critical of its HIV/AIDS policy, such as Dr Abe Nkomo, Dr Essop Jassat and other members of the Health Portfolio Committee. Alongside the Arms Deal, the silencing of ANC MPs who were critical of the then-President and Minister of Health on HIV weakened Parliamentary oversight. TAC similarly worked with allies in the national and provincial Health Departments. Just as in the case of PRASA, we worked with whistle-blowers at every level of the state including Parliament.
34. I helped establish Equal Education; the Social Justice Coalition (SJC); Ndifuna Ukwazi and Reclaim the City among other organisations.
35. I have a personal interest in PRASA for the following reasons. My wider family, comrades, and I have been and are reliant on public transport (rail and buses) and semi-private transport such as mini-bus taxis, Uber and the cars of friends to commute or travel long distances. From 2001, I became conscious of the collapse of the commuter rail service because of the violent crime and deaths on the trains. The murder of Juan van Minnen, and his parents' fight for justice culminated in the CC's historic decision in *Rail Commuter Action Group and Others v the South African Rail Commuter Corporation (t/a Metrorail) and Others* and the final settlement in the Western Cape Court. One of the outcomes of that matter was the investment of billions of Rands purportedly for new and improved infrastructure including rolling stock, secure access to train stations, communications and CCTV surveillance. This

coincided with upgrades for the 2010 World Cup. Since that time, I have personally taken interest in developments at PRASA and as a consequence became aware of the corruption and later state capture at the rail agency. As detailed below, instead of reducing violent crime for train commuters, it has become much worse.

CONSTITUTIONAL AND LEGAL GROUNDS FOR THE COMPLAINT

36. State capture at PRASA, its mismanagement, maladministration and collapse must be attributed to the unlawful actions of Mr Sfiso Buthelezi, Ms Dipuo Peters, Ms Dikeledi Magadzi, Mr Mckacani Maswanganyi, Mr Fikile Mbalula and Mr Mosebenzi Zwane.
37. As the Respondents in this complaint violated the Constitution, a range of laws and Parliament's Code of Conduct.
38. In their executive, oversight and governance roles at the Passenger Rail Agency of South Africa, Mr Sfiso Buthelezi, Ms Dipuo Peters, Ms Dikeledi Magadzi, Mr Mckacani Maswanganyi, Mr Fikile Mbalula and Mr Mosebenzi Zwane have through their acts and omissions failed to prevent injury, loss of life, the destruction of infrastructure, the loss and persecution of competent, qualified, skilled and ethical professionals, the wholesale theft of assets, corruption worth billions of Rands and state capture. In fact, they have facilitated and enabled state capture and corruption through a failure of their ethical and legal duties of care. At least one Respondent, Mr Sfiso Buthelezi, has directly benefitted from corruption in the Swifambo/Vosloh locomotives contract.
39. The Respondents have directly contributed to violations of the rights of workers and work-seekers, students, the elderly, infirm, women to safe, reliable, affordable, accessible and efficient commuter rail service.
40. The collapse of the commuter rail services for which the Respondents must assume leadership responsibility has violated, among others, the rights to life, dignity, bodily and psychological integrity, work, education, health and freedom of movement.
41. The Respondents have violated section 195 of the Constitution which requires organs of state and individuals to, among others, promote and maintain a high standard of professional ethics, promote an efficient, economic and effective use of resources, and ensure an accountable public administration.

THE DESTRUCTION AND COLLAPSE OF PRASA AND ITS IMPACT ON COMMUTERS

42. UniteBehind's #FixOurTrains campaign aims to address the governance issues at PRASA, to root out corruption in PRASA, and to fix the dysfunctional commuter-rail services.
43. Violence and train delays have a severe impact on hundreds of thousands of commuters who are dependent on Metrorail services. The rail system is the most affordable mode of transport that is accessible to mainly Black African and Coloured working-class commuters, many of whom are women, children and people with disabilities. When commuters are prevented from using the trains due to the levels of crime on the trains, at train stations, and in areas surrounding the stations, as well as when trains are not working, they are forced to incur the added costs of alternative transport. Commuters are, as a result, often late for work, risking (and losing) their jobs. This plunges many families, already struggling with poverty and harsh prevailing socio-economic conditions, further into poverty.
44. Almost every week, crimes against women occur on trains operated by PRASA. Women and girls are often harassed and sexually assaulted with little-to-no security systems present to protect them. Delays lead to learners losing time at school and at home, as well as exacerbate crime – to which learners are particularly vulnerable. Whole carriages are at times held hostage and robbed when trains are stopped in-between stations. These stoppages result in further injuries when passengers have to jump-off the trains.
45. Workers lose income and face threats of dismissal, whilst small businesses are crippled by absenteeism and late coming. In short, organisational dysfunction and corruption in PRASA has, and continues to, cost lives. PRASA's failure has increased the suffering of commuters and their families and has simultaneously caused serious and major harm to the economy.
46. Currently, very few Gauteng commuter rail trains are running. In Cape Town, the Central Line, servicing over 120,000 commuters who are overwhelmingly working-class and poor African and Coloured people, has been intermittently shut down from 2017 to 2018 and completely shut down since 2019. Only 53 train trips are running per average weekday in the City, down from 444 in 2019. In 2013, 13% of workers (700,000) used trains across South

Africa. In 2020, only 3.3% of workers (150,000) used trains. The figure is likely much lower, given the continued irregular, inefficient or non-existent commuter rail service in much of the country.

47. The consequence of a broken commuter rail system, such as we see today, is that more commuters are forced to use buses and minibus taxis to get to work. This has produced an unexpected burden on our public and private road transport. The City of Cape Town estimated, in 2019, that R2.8 billion is lost annually because of the crisis in transport for commuters through lost productivity and other economic costs.² This figure is now likely much higher.
48. A commuter on an hourly wage of R17 who spent two hours traveling would have an effective hourly wage of R12.50, once time and expenses are accounted for; a 28% tax compared to a person who did not need to incur these costs.
49. Money that has been stolen and misspent at PRASA should have gone to making our rail system safe, reliable, accessible and affordable. We should have competent guards, secured entry, lights, communications, sufficient rolling stock, and no delays or cancellations; but we do not. Instead, people suffer daily injustice and indignity. The crookedness of the captured state is a sickness that produces terror, depression and deprivation in the working class and poor.
50. The capture of PRASA has brought about the above crisis in rail commuting and the extensive negative impacts on commuters. #UniteBehind's complaint is against several current Members of Parliament who have been implicated in corruption and maladministration, relating to PRASA, and who are responsible for the breakdown of rail services and the terrible impact it has had on poor and working class commuters.

MR SFISO BUTHELEZI

51. Mr Buthelezi is the current Chairperson of the Standing Committee on Appropriations and the First Respondent in this complaint. He has engaged in unlawful and corrupt activities throughout his tenure as Chairperson of the PRASA Board of Control. Mr Buthelezi must be

² See Cape Argus Traffic Congestion in Cape Town costs the City R2.8 billion a year

investigated by the Parliamentary Ethics Committee for offences in terms of the Public Finance Management Act, the Prevention and Combatting of Corrupt Activities Act and the Prevention of Organised Crime Act.

51.1. Mr Buthelezi chaired the PRASA Board between 2009 and 2015 and the evidence contained in the Derailed Report, Treasury and Werksmans investigations show that, as the Accounting Authority he was complicit in corruption, maladministration, malfeasance and mismanagement. Hundreds of contracts were found to be unlawfully concluded during Mr Buthelezi's tenure at PRASA.

51.2. The Deloitte Reports commissioned by Treasury³ made the following findings in relation to the PRASA Board chaired by Mr Buthelezi and recommended action be taken to institute criminal proceedings:

As indicated in the detailed discussion in section 3 of this report, the board is PRASA's accounting authority and sections 50 and 51 of the PFMA accordingly apply thereto. In view of the frequent deviations from an open procurement process we agree with the public protector that there was an abuse of the procurement process which is supposed to be fair, equitable, transparent, competitive and cost effective as enshrined in the Constitution, the PFMA and PRASA's SCM policy of 2009 and 2014 respectively. There is no evidence to suggest that the PRASA board questioned any of the deviations.

There is no evidence that the board intervened at any stage to question the procurement procedures followed. The board did not act with the necessary fidelity, honesty and integrity in the best interests of PRASA in managing its financial affairs as the PFMA requires of an accounting authority and in fact appears not to have played any role in relation to exercising care to protect the assets and records of PRASA. This warrants further investigation by the SAPS for possible contraventions of sections 50 and 51 of the PFMA read with sections 49, 83 and 86. Dr Phungula and Mr Montana appears to have been involved in all the appointments we investigated via deviations from processes where invariably there would be no audit trail due to a dearth of supporting documentation that must and should have been retained. This raises the suspicion that Dr Phungula and Mr Montana might have benefitted unduly from these appointments.

³ https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2. Deloitte/PRASA_Final Report_15 December 2016.pdf

In terms of section 34 of the Prevention and Combating of Corrupt Activities Act, No 12 of 2004 any person who holds a position of authority and who knows or ought to have known or suspected that another has committed an offence of corruption, or fraud or theft involving R100 000.00 or more, is obliged to report such knowledge or suspicion or cause it to be reported to the South African Police Services (SAPS).

We recommend that National Treasury report these concerns to the SAPS for further investigation.

We further recommend that **the reporting of the matter to the SAPS should cover possible contraventions of sections 50 and 51 of the PFMA by PRASA's Board and contraventions of sections 57 (1) of the PFMA by Dr Phungula and Mr Montana.**

51.3. The DPCI (Hawks) report conducted by Ryan Sacks was revealed at the State Capture Commission and irrefutably demonstrates that companies associated with Mr Buthelezi were direct beneficiaries of the proceeds of corruption⁴ in the Swifambo case.

51.4. Mr Buthelezi was chair of the PRASA Board and signed off on the contracts, despite serious concerns being raised by PRASA employees beforehand. Further, Swifambo appointed Inala Shipping – a company 100% owned by Mr Buthelezi's brother Nkanyiso Buthelezi – to manage the shipping and logistics for the importing of the trains. Inala then appointed Sebenza Forwarding and Shipping to handle the customs-clearing role in importing the locomotives in 2014 and 2015. Sebenza was paid R99 million by PRASA for its services. Sebenza is 55% owned by Makana Investment Corporation. Buthelezi was a director of Makana until 2016, after the money was paid to it. He did not disclose his interest in Sebenza during his tenure as the Chair of the PRASA Board.

51.5. In the infamous 'tall trains' saga, a South African company (Swifambo), fronting for a Spanish subsidiary of the German multinational (Vossloh), was awarded a contract to supply PRASA with 70 locomotives. The procurement process contravened PRASA's procurement policy and was rife with corruption. There was little attention to detail and Swifambo supplied locomotives that were too tall for South Africa's railways. They also only supplied 13 locomotives before the contract was suspended, despite R2.6 Bn already

⁴ [https://www.statecapture.org.za/site/files/documents/411/Day_350_-_SS_24_Sacks_RM_\(Prasa_Bundle_L\).pdf](https://www.statecapture.org.za/site/files/documents/411/Day_350_-_SS_24_Sacks_RM_(Prasa_Bundle_L).pdf)

being paid to Swifambo (R144m per locomotive). 7 of these locomotives were sold on auction for a total R65m (R9.3m per locomotive). The South Gauteng High Court declared the contracts invalid, and the Supreme Court of Appeal confirmed the ruling.⁵

52. The State Capture Report recommends that the National Director of Public Prosecutions considers instituting a prosecution, in terms of section 86(2) of the Public Finance Management Act Mr Buthelezi, among others, for approving the corrupt Swifambo contracts.⁶
53. Further, in 2017, the Department of National Treasury investigated 216 contracts between PRASA and other entities. Investigative reports into 30 of the contracts recommended that Mr Buthelezi should be criminally charged for his involvement and, specifically, contravening the PFMA.⁷
54. As Chair of the BoC, Buthelezi had ultimate responsibility of PRASA. There are a number of findings against the BoC, the accounting authority and Buthelezi in the Public Protector's 2015 Derailed report, for improper conduct and maladministration.
55. Mr Buthelezi, in his current role, is “responsible not just for allocating funding to government departments, including SOEs like PRASA, but also for ensuring compliance with the Public Finance Management Act and other procurement legislation.”⁸ Given the importance of his role in upholding integrity, accountability, and good governance, it is vital that investigations into Mr Buthelezi's alleged conduct be initiated and that he is held to account. He must immediately be suspended from his current position. The Chairperson of the Standing Committee on Appropriations should not be shrouded in allegations of corruption and maladministration. Further sanctions should be instituted against him when it is found that he is in breach of the Code of Conduct, the Prevention and Combatting of Corrupt Activities Act, the Public Finance Management Act, and the Constitution.

⁵ Swifambo Rail Leasing (Pty) Limited v Passenger Rail Agency of South Africa 2020 (1) SA 76 (SCA)

⁶ State Capture Report Part V Vol II, Para 2191.5, pg.852.

⁷ Lucas Nowicki. 10 Nov 2021. “Sfiso Buthelezi, the MP who derailed PRASA.” *Daily Maverick*. Online: <https://www.dailymaverick.co.za/article/2021-11-10-sfiso-buthelezi-the-mp-who-derailed-prasa/>

⁸ Ibid.

MS DIKELEDI MAGADZI AND PORTFOLIO COMMITTEE (PCOT) ON TRANSPORT MEMBERS

56. In 2018, #UniteBehind requested an opportunity to address Parliament on state capture at PRASA. Our submission was titled: *Submission to the Portfolio Committee on Transport on State Capture, Governance and an Emergency Safety* (6 February 2018).
57. Ms Dikeledi Magadzi (the Third Respondent) was then the Chairperson and Mr Leonard Ramatlakane was then the committee's Deputy Chairperson. (He is now the Chairperson of the PRASA Board of Control.)
58. In order to sustain our contention that Ms Magadzi, Mr. Maswanganyi, Mr. Ramatlakane and others are guilty of violating the Constitution, various laws against corruption and the obstruction of justice, I cite the submission at some length. It reads as follows:

URGENT LEADERSHIP INTERVENTIONS REQUIRED FROM PARLIAMENT; A NEW PRASA BOARD AND EXECUTIVE MANAGEMENT

4 Safety and security represents an urgent emergency and PRASA is mired in state capture, corruption, mismanagement and maladministration. The crisis in safety and security cannot be adequately resolved without simultaneously addressing the crisis in governance and management. We therefore request the following urgent action to bring relief to workers, students, communities and the economy.

4.1 The Passenger Rail Agency of South Africa (PRASA) will not emerge from the current crisis unless and until a new board is appointed. Cabinet must instruct the Minister of Transport to appoint a credible new board with the requisite qualifications, experience, skills and competencies.

4.2 All those implicated in corruption, mismanagement, maladministration must be removed from PRASA. Parliament must instruct the Board to continue investigations and to support all criminal and civil proceedings against those involved in state capture and corruption at the rail agency.

4.3 Investigations must be concluded and the rapid prosecution of cases against all those involved in the criminal enterprise to capture PRASA must be prioritised. In particular, Sfiso Buthelezi, Makhensa Mabunda, Lucky Montana, Mthura Swartz, Roy Moodley, Mario Ferreira, Arthur Fraser, Manala Manzini, Auswell Mashaba, Josephat Phungula, Chris Mbatha, Daniel Mthimkulu, Rebecca Setino, Maishe Bopape and Ernest Gow have cases to answer based on all the available evidence. See our attached annexures and submission to Parliament for further details on the above individuals.

4.4 Criminal investigations must also include international companies such as Vossloh Espana/Stadler Rail which has stolen billions of rand through contracts like Swifambo Rail (locomotives). The relevant European regulatory authorities must be contacted.

4.5 A qualifications, skills, competencies and life-style audit is urgently needed for PRASA management at every level, starting with head office and its Western Cape region. The new Board must lead this audit to ensure that people's needs are prioritised and the economy (particularly in Cape Town where the rail system forms the backbone of all public transport) is stabilised.

4.6 All PRASA appointments must be merit based with open competition. Only appropriately qualified, skilled, competent and experienced people must be appointed at managerial and supervisory levels.

4.7 An urgent safety plan is needed to enable commuters to travel without constant fear of being crushed to death, thrown from the train or attacked by criminals. We believe the following are among the immediate steps required:

4.7.1 The reopening of the Central Line with adequate security.

4.7.2 Security employed by PRASA must be qualified and PSIRA compliant. They must be supported by the South African Police Service and the Law Enforcement Officers of the City of Cape Town. All current security employees must be assessed; where possible redeployed and trained. Those with serious criminal records must be dismissed.

4.7.3 The protection of commuters and all workers, particularly women, children and other vulnerable people, must be prioritised. This can be partially achieved through securing of stations and their surrounds (including proper lighting and CCTV surveillance).

4.7.4 Separate compartments are needed for women, children and differently abled commuters. This has been successfully implemented in other countries such as India. Organisations such #UniteBehind and the broader commuting public must be involved in the development of a plan with clear objectives; targets; deadlines and budgets.

4.7.5 Specific details and timeframes for any such safety plans or measures be communicated to all commuters.

4.8 In Cape Town the passenger rail service must be coordinated and at an appropriate time transferred to the relevant local authority as contemplated the Draft White Paper of the National Rail Policy – June 2017. Much of our work involves campaigning against the anti- poor and anti-black policies of the City of Cape Town's DA administration, but in this instance the City has made a realistic set of recommendations which should be taken seriously. Most importantly however, is that the National Land Transport Act requires that all land transport including rail be integrated with municipal transport. This international standard is crucial to the provision of efficient, accessible and reliable integrated transport systems in our metros.

4.9 Alternative forms of transport, like busses, must urgently be provided to commuters who ordinarily use lines that are currently suspended or those facing constant delays.

4.10 In the medium term we need a proper plan: How do we stop delays? What new rolling stock is needed? Is there surplus rolling stock elsewhere? Which of the existing coaches, not in use, could be upgraded rapidly?

4.10.1 As much as possibly such rolling stock must be manufactured and procured locally to develop our manufacturing sector, creating employment and stimulating growth.

5 The above recommendations combine a set of priorities for parliament, a new board, and a Minister of Transport to stabilise the passenger rail service in every region. Government (all its different arms and spheres) cannot save our rail service alone. People who use public transport, business, trade unions, schools and communities and #UniteBehind stand ready to assist.



59. Further evidence of Ms Magadzi's lack of fitness to hold public office and to be held accountable in law is provided in the State Capture Report and evidence before that Inquiry: in particular, her dereliction to address Mr Popo Molefe's evidence provided to the PCOT and the Speaker of Parliament.
60. Mr Popo Molefe became the Chair of the Board of PRASA in 2014. He and his Board ('the Molefe Board') started to clean up the corruption at PRASA that was detailed, at the time, in the Public Protector's report into such.⁹
61. The Molefe Board was mistreated by the PCOT, particularly by Ms Dikeledi Magadzi, the current Deputy Minister of Water and Sanitation and then-Chair of the PC. On 31 Aug. 2016, the Board was called before the PCOT. The Board was "vilified by ANC members of the Portfolio Committee." The State Capture Report specifically singled out the antagonistic behaviour by the ANC members of the Board¹⁰ and failed to focus on the important issues of corruption and maladministration at PRASA. The ANC members in the PCOT include the following current MPs: Ms Dikeledi Magadzi, Mr Mkhacani Maswanganyi (the current Chairperson of the Standing Committee on Finance), and Ms Tembalam Xego (a member of the PC on Tourism).¹¹
62. Mr Molefe complained to Ms Magadzi and asked for the intervention of the then-Speaker of the House, Ms Baleka Mbete. No protection came and the Board endured further antagonization and lack of support from the Board in tackling corruption at PRASA. The State Capture Report heavily criticised the "treatment meted out to the Molefe Board by Minister Peters (dealt with below) and the Portfolio Committee. They too were under a duty to ensure that corruption was rooted out from public entities. In this they failed."¹²
63. Further, the State Capture Report found that "after the Molefe Board left office, the Portfolio Committee did little. Ms Magadzi did not say what her Committee did to bring wrongdoers to book. She did mention that, when allegations of procurement irregularities 'surfaced in the

⁹ Public Protector. August 2015. "Derailed." Report no. 3 of 2015/16. Online: https://www.gov.za/sites/default/files/gcis_document/201508/publicprotectorinvestigationreportno3of201516prasa24082015a.pdf

¹⁰ State Capture Report Part V Vol II, Para 1787.2, pp.645-6

¹¹ Parliamentary Monitoring Group. 31 August 2016. "PRASA Inquiry: Day 2." Online: <https://pmg.org.za/committee-meeting/23186/>

¹² State Capture Report Part V Vol II, Para 2031, p.778

media', the Committee conducted inspections of, among other things, the 'tall trains' that were not fit for purpose. Ms Magadzi's response betrays a total lack of understanding of how corruption of procurement is uncovered or the nature of the irregularities committed during the tender process for the locomotives contract. ... it is not unreasonable to conclude that the ANC members of the Portfolio Committee failed to properly execute their oversight function over the Executive in regard to PRASA. ...it must be considered that they are undeserving of being members of a public oversight body."¹³

64. Further, "Ms Magadzi's inadequacies as the Chairperson of the Portfolio Committee," were heavily criticised in the State Capture Report. "However, notwithstanding those inadequacies, she has been elevated to the position of Deputy Minister.... Again, the question must be raised: is it in the public interest to appoint as a Deputy Minister someone who has not covered herself in glory in performing important oversight functions."¹⁴

65. The failure of the ANC Members, particularly Ms Magadzi's oversight of PRASA and antagonistic approach to the Board must be investigated by the Parliamentary Ethics Committee and the current members of parliament, listed above, must be called to account. Ms Magadzi should also be suspended from Parliament.

MS DIPUO PETERS

66. Ms Peters is a current Member of the Standing Committee on Appropriations

67. Ms Peters was identified as being neglectful of her ministerial duties in failing to appoint a permanent Group CEO of PRASA in her tenure as Minister of Transport. In her testimony to the State Capture Commission, she stated that the reason for her failure to appoint a permanent Group CEO of PRASA was because PRASA was "not ready a new CEO. ... How a company that had been in existence and in operation for many years and had had a Group CEO for many years suddenly became not ready for a new CEO is incomprehensible. This was a bizarre decision by the Minister Peters for failing to ensure that a new CEO for PRASA was appointed." Further, "[h]aving regard to the totality of evidence of this issue, the inference is irresistible that there was some reason for not filling that important position. Former Minister Peters' failure to disclose it suggests that it was not a proper one. The consultation

¹³ State Capture Report Part V Vol II, Paras 2170-3, pp. 842-3

¹⁴ State Capture Report Part V Vol II, Para 2173, p.843

process in finding a new CEO, which amounted to nothing, cost the PRASA R1 767 000 in wasteful expenditure.”

68. It was deemed a “direct financial cost ... [from] Ms Peters’ decision not to act on the Board’s recommendation [and]... It is recommended that the Board of PRASA consider taking legal steps to recover from her that amount plus interest.”¹⁵ However, it is within Parliament’s power to do likewise and, further, consider whether such conduct, while Ms Peters was a member of Parliament, is a contravention of the Code of Conduct.
69. Ms Peters dismissed the Molefe Board, seemingly because it had uncovered R14Bn of irregular expenditure and instituted investigations into corruption at the PRASA. She did not provide any reasons for the dismissal and the dismissal was overturned in the High Court,¹⁶ who found her conduct to be “irrational”, “unreasonable” and “unlawful.”¹⁷
70. She also attempted to stop the investigations into corruption at PRASA initiated by the Molefe Board.¹⁸ Further, when it came out that Mr Auswell Mashaba, the then-director of Swifambo, had paid R79 Million of PRASA-gained funds to people who would then transfer the monies to the ANC, she did not take action to investigate this clear case of corruption. As stated in the State Capture Report, “one would have expected that as the Minister to whom PRASA was accountable, she would have insisted that that embarrassing allegation was expeditiously pursued: either to clear the name of the ANC or bring wrongdoers to book. She did neither. She stood by.”¹⁹ Minister Peters is rightfully identified as having mistreated the Molefe Board. She, too, was “under a duty to ensure that corruption was rooted out from public entities. In this [she] failed.”²⁰
71. She also attempted and did, in fact, use PRASA transport (busses) for ANC events in 2014 and 2015, without ensuring that the ANC paid for such use. Per the State Capture Report, “[g]iven that she was the Minister, there would have been a duty to do so.”²¹

¹⁵ State Capture Report Part V Vol II, Para 2090, pp.800-1

¹⁶ State Capture Report Part V Vol II, Para 1800, pp.656-7

¹⁷ *Molefe and Others v Minister of Transport and Others* (17748/17) [2017] ZAGPPHC at 120

¹⁸ State Capture Report Part V Vol II, Para 1793, p.650

¹⁹ State Capture Report Part V Vol II, Para 2175, p.845

²⁰ State Capture Report Part V Vol II, Para 2031, p.778

²¹ State Capture Report Part V Vol II, Para 2044, p.783

72. Former CEO of PRASA Mr Lucky Montana, who is also widely implicated in state capture at the entity, outlines in great detail the interference of former Ms Peters in his evidence to the 2018 Parliamentary Inquiry into Eskom.²² In his submission, Mr Montana stated that Ms Peters attempted to influence procurement proceedings through pressuring the PRASA CEO and Board of Control simply because of the nationality of the tender applicants. She demanded changes to the procurement proceedings despite PRASA having obtained a legal opinion stating that the changes would be “in breach of the procurement laws of the country and provisions.”²³
73. Ms Peters must be called to account for these serious cases of failing in her parliamentary duties, maladministration, and taking active role in inhibiting the work of ensuring that corruption and maladministration be arrested at PRASA. She must be suspended pending the outcome of the investigation.

MR MKHACANI MASWANGANYI

74. Mr Maswanganyi is the current Chairperson of the Standing Committee on Finance.
75. Mr Maswanganyi took over from Ms Peters as Minister of Transport. According to Mr Molefe, mentioned above, Mr Maswanganyi “continued to attempt to thwart the operations of PRASA and prejudice its attempts to address Derailed... the new minister has refused to meet with the board; despite repeated requests... rather than dealing with the critical substantive issues and supporting the work of the board, Minister notified the board of his intention to remove the Board in June 2017; and the minister has undermined the authority of the board, including its authority to complete its investigations and take steps in addressing corruption at PRASA.”²⁴
76. Mr Maswanganyi never met with the Molefe Board and weakened the Board by not appointing members to it so that it became inquorate – hamstrung and unable to make decisions.²⁵ He, “in effect rendered it unworkable. What is however more worrisome ... [is that] he said that it was Parliament that had decided to dissolve the Board and a ‘Minister cannot go against a

²² Statement by Tshepo Lucky Montana, Former PRASA CEO, Parliamentary Inquiry Into Corporate Governance at ESKOM (Cape Town: 30 January 2018), pp. 21-27.

²³ Ibid., p.22

²⁴ Fin24. 31 July 2017. “Popo Molefe lashes out at minister, as PRASA loses its board.” *News24*. Online: <https://www.news24.com/fin24/popo-molefe-lashes-out-at-minister-as-prasa-loses-its-board-20170731>

²⁵ State Capture Report Part V Vol II, Para 1804 pp.657-8

decision' taken by Parliament! On that score, Mr Maswanganyi is simply wrong. As powerful as Parliament is, the power to dismiss the Board lies with the Minister. It is considered that there should be serious reservations about appointing as a Minister [or indeed, a Chairperson of a vital Portfolio Committee] a person who has so limited an understanding of who holds the reins of power in respect of matters that fall within his Portfolio."²⁶

77. Further, "Mr Maswanganyi, too, did not do the necessary to have a new GCEO appointed. ... This meant that for three years PRASA operated without a permanent Acting Group CEO's only."²⁷

78. Mr Maswanganyi appointed "an interim" Board of Control (BoC) for the Passenger Rail Agency of South Africa (PRASA) "until further notice", on the 19th of October 2017. This appointment is unlawful in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 (the Legal Succession Act), which does not allow for the appointment of an "interim board." This Board under the leadership of Justice TAN Makhubele acted contrary to the Constitution, the PFMA, the Legal Succession Act and laws governing corruption and organised crime. The Makhubele Board specifically:

- 78.1. Attempted to stop all further investigations into state capture at PRASA;
- 78.2. Engineered a resolution (1 December 2017) to stop PRECCA prosecutions;
- 78.3. Unlawfully settled the arbitration with the Siyaya or S-Group; and
- 78.4. Consciously flouted the fact that it was unlawfully constituted.

79. Mr Maswanganyi was at all material times aware of this unlawful conduct and participated in it by opposing the *UniteBehind & Equal Education v Minister of Transport & PRASA* (23200/17) ZAWCHC, where irrefutable evidence was placed before the Court.

80. The Ministry of Transport, in the person of Ms Sindi Chikunga, (then and now the Deputy-Minister of Transport) was provided with a copy of the #UniteBehind submission - ***Submission to the Portfolio Committee on Transport on State Capture, Governance and an Emergency Safety*** (6 February 2018) (ZA2). Neither Mr Maswanganyi nor Ms Chikunga can claim ignorance of among others the following evidence placed in front of them by #UniteBehind:

²⁶ State Capture Report Part V Vol II, Para 2173, p.844

²⁷ Para 2077, p.797

- 80.1. PRASA's leadership and governance crisis;
 - 80.2. The duty to remove the criminal network which engineered PRASA's capture;
 - 80.3. Ensure the prosecution of this criminal network;
 - 80.4. Ensure the prosecution of all companies that benefitted from state capture; and
 - 80.5. The need for an emergency safety plan.
81. In the period without a Board of Control, Mr Maswanganyi attempted to negotiate unlawfully with China to develop the Moloto Rail Development Corridor at the price of about R57 billion.²⁸ He attempted to circumvent procurement rules by negotiating an international development treaty with China.
82. Mr Maswanganyi must be called to account, charged and suspended from Parliament for the above maladministration and malfeasance during his tenure as the Minister of Transport.

MR MOSEBENZI ZWANE

83. Mr. Zwane is the current Chairperson of Portfolio Committee on Transport.
84. Mr Zwane was not implicated in the State Capture Report on PRASA. However, as he is the current Chair of the PC on Transport, his ethical conduct and capacity to arrest the rot at PRASA is a crucial point for our organisation. He has been implicated in severe corruption and maladministration at ESKOM, while he was the Minister of Mineral Resources, and the State Capture Report has recommended that he be criminally prosecuted for this.²⁹ The Report also recommended that he be investigated over the Vrede dairy farm project. Further, "Zwane and Magashule should be sued to recover money [R280m] lost as a result of their alleged conduct in relation to the alleged scam."³⁰

²⁸ "PRASA signs agreement to build Moloto Rail Development Corridor", Citizen, <https://citizen.co.za/news/south-africa/1277474/prasa-signs-agreement-to-build-moloto-rail-development-corridor/>, accessed 30 October 2019

²⁹ Junior Khumalo. 29 Apr. 2022. "Rampant corruption': Mosebenzi Zwane, Rajesh Gupta and ex-Eskom bosses must be prosecuted – Zondo." *News24*. Online: <https://www.news24.com/news24/southafrica/news/rampant-corruption-mosebenzi-zwane-rajesh-gupta-and-ex-eskom-bosses-must-be-prosecuted-zondo-20220429>

³⁰ Karyn Maughan. 23 Jun 2022. "Zondo says Magashule, Zwane pushed 'Gupta agenda' with Vrede project, recommends criminal probe." *News24*. <https://www.news24.com/news24/southafrica/news/zondo-says-magashule-zwane-pushed-gupta-agenda-with-vrede-project-recommends-criminal-probe-20220623>

85. Thus, Mr Zwane should be investigated by the Ethics Committee, removed from his position and disciplined accordingly.

MR FIKILE MBALULA

86. Mr Mbalula is the current Minister of Transport. He has at all material times acted unlawfully in relation to PRASA. Among other violations of his oath as a Minister:

86.1. Minister Mbalula ignored our letters, attempts to meet and memoranda on the crisis of leadership, governance, operations and state capture at PRASA. The Minister failed in his duties to act diligently and without delay in these matters;

86.2. He appointed an “administrator” in disregard of the Legal Succession Act;

86.3. #UniteBehind went to court against Mr Mbalula on the above and won with costs;

86.4. The currently suspended Public Protector found that Mr Mbalula acted unlawfully in appointing Mr Bongisizwe Mpondo as the PRASA administrator who in turn appointed his coterie of “special advisors;”

86.5. #UniteBehind went to court to ensure the safety of commuters and PRASA assets during the crisis and Minister Mbalula continues to oppose the matter;

86.6. Mr Mbalula is directly responsible for the destruction of PRASA assets since his tenure started;

86.7. The PRASA Board, specifically Mr Ramatlakane, attempted to flout a High Court judgment in the Siyangena Technologies matter to the tune of about R3 billion. Mr Mbalula failed to remove the Board for blatantly unlawful conduct; and

86.8. Similarly, Minister Mbalula is directly involved in the Swifambo/Stadler Rail matter where once again there is a flouting of the court order by the Supreme Court of Appeal.

87. The Public Protector has made several adverse findings against Mr Mbalula.



87.1. The Public Protector found, in 2018, that Mr Mbalula “violated the Ethics Code when he undertook a family vacation with his wife and children during the period 28 December 2016 to 3 January 2017”³¹ and that there were irregularities and improprieties in the funding of this vacation. Half of the expenses of the vacation were paid by company owned by Mr Yusuf Dockrat, a friend of Mr Mbalula. The company paid R300,000 to Mr Mbalula’s travel agent for the vacation. This is a clear conflict of interest and, consequently, the Public Protector found that Mr Mbalula’s conduct “was grossly at odds with the provisions of section 96 of the Constitution read with the Executive Ethics Code in particular paragraphs 2 and 3 of the Code.”³²

87.2. Criminal charges of corruption and money laundering have also been laid against Mr Mbalula for his conduct around this vacation.³³

87.3. The Public Protector also found, in 2021, that Mr. Fikile’s “appointments of Messrs. Venkile, Khoza and Mpondo respectively, were contrary to the provisions of the Public Service Act and other prescripts applicable to the National Department of Transport.” The report states that “The appointments were done contrary to the Dispensation for the Appointment and Remuneration of Persons (Special Advisers) Appointed by the Executive Authorities on Ground of Policy Consideration in terms of section 12A of the Public Service Act which states that the Executive Authorities must submit proposals/recommendations for the appointment of individual Special Advisers to the MPSA for approval of the individual’s compensation level before the appointment/upgrade is effected.”³⁴ The Public Protector also found that “Messrs. Venkile and Khoza respectively were irregularly paid salaries which are equivalent to that of the DDG level whilst their appointment were not approved by the [Ministry for Public Service and Administration].”³⁵

³¹ Report No. 24 of 2018/19 into allegations of a violation of the Executive Ethics Code, conflict of interest, improper and/or irregular conduct in connection with funding and/or sponsorship for a family holiday trip undertaken to Dubai during the period 28 December 2016 to 3 January 2017 by former Minister of Sport and Recreation Mr Fikile Mbalula., p.9

³² Public Protector Report No. 24 of 2018/19 n30, p.10

³³ eNCA. 6 Aug 2019. “AfriForum lays criminal charges against Mbalula.” Online: <https://www.enca.com/news/afriforum-lays-criminal-charges-against-mbalula>

³⁴ Office of the Public Protector. 30 June 2021. “Report No.13 of 2021/22 on an investigation into allegations of irregular appointment of Ministerial Advisers,” p.10

³⁵ Ibid., p.11

88. Further, “The conduct of Minister Mbalula constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration in terms of section 6(4) (a) (i) of the Public Protector Act.”³⁶

89. Mr Mbalula must be suspended and called to account for his improper conduct and possible breaches of the Constitution, the laws against corruption and organised crimes; the unlawful costs incurred by his futile opposition in court matters and Parliament’s Code of Conduct.

BREACHES OF THE CODE OF CONDUCT

90. Parliament’s Code of Conduct states that Members must “abide by the principles, rules and obligations of this Code.”³⁷ The principles outlined in the code are: selflessness, integrity, objectivity, honesty, and leadership.³⁸ Further, of course, Members must uphold the law.³⁹ Members must: “act on all occasions in accordance with the public trust placed in them; discharge their obligations, in terms of the Constitution, to Parliament and the public at large, by placing the public interest above their own interests; maintain public confidence and trust in the integrity of Parliament and thereby engender the respect and confidence that society needs to have in Parliament as a representative institution.”⁴⁰

CONCLUSION

91. #UniteBehind makes this complaint to ensure that our leaders, and the managers and employees of PRASA comply with their constitutional and statutory obligations, and, where they do not, the bodies to whom they are answerable hold them to account without fear, favour or prejudice. It is precisely because the repositories of power and those who are required to hold them to account have betrayed the public trust that the violation of the rights of vulnerable people who use trains – particularly the elderly, infirm, people with disabilities, women and children – occurs daily.

³⁶ Ibid.

³⁷ Art. 4.1.1 of the Code of Conduct

³⁸ Art. 2.4 of the Code of Conduct

³⁹ Art. 4.1.2 of the Code of Conduct

⁴⁰ Art. 4.1.3-4.1.5 of the Code of Conduct

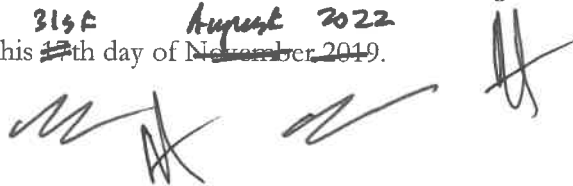
92. State capture at any organ of state undermines justice, equality and freedom for working-class people because it exacerbates inequality through the theft of financial resources required for infrastructure, assets and services in our society. There can be little doubt that state capture also impedes growth and stability. This is especially so at an institution like PRASA which is required to serve the interests poor and vulnerable people. #UniteBehind has a specific view on the causes of state capture in the current period which is set out below.
93. A critical set of causal factors underlie the success, scale and gravity of state capture which benefits local and global corporations. First, the unconscionable inequality in wealth and income based on the historical articulation of race, class and gender that has arisen through colonialism and apartheid. Second, a democratic project that has failed to redistribute wealth and to reduce income inequalities through state-owned enterprises, and the broader state economic apparatus, has created the material conditions for state capture. Instead, wealth and income inequality have worsened. Third, the existence of a Black (racially defined as African, Coloured and Indian) middle-class stratum who witnessed that the earlier “Black Economic Empowerment” project in the traditionally White-owned corporations grossly benefitted a narrow band of politically connected individuals. Consequently, this “left-out” stratum of politicians, bureaucrats and their business allies sought to use the state-owned enterprises as a means to accumulate private wealth and to promote excessive managerial salaries and bonuses through nepotism, fraud, corruption and malfeasance. This is also true for state capture at PRASA.
94. I reiterate that in relation to PRASA, we have made many submissions, written numerous letters, received and published information from whistle-blowers, picketed, organised marches and gatherings, litigated, and organized protests and pickets. Unfortunately, the relevant arms of the state and PRASA have failed to fulfill their constitutional and statutory obligations diligently and without delay
95. Sfiso Buthelezi, Dipuo Peters, Dikeledi Magadzi, Mkakani Joe Maswanganyi, Fikile Mbalula, and Mosebenzi Zwane must be suspended, investigated, charged and removed from Parliament. Criminal charges must be proffered and #UniteBehind will forward this affidavit to the National Director of Public Prosecutions, Advocate Shamila Batohi.

96. I am available to provide more information, explanation, and any other assistance via oral or written communication.



ABDURRAZACK "ZACKIE" ACHMAT

The terms of Regulation R. 1258 published in Government Gazette No. 3619 of 21 July, 1972 (as amended) having been complied with, I hereby certify that the deponent has acknowledged that he knows and understands the contents of this affidavit which was signed and sworn to before me at CAPE TOWN on this ^{31st} ~~17th~~ day of ^{August 2022} ~~November 2019~~.



COMMISSIONER OF OATHS

Full names: **PHILIP ALBERT MYBURGH**
Address: **PRACTISING ADVOCATE**
LEEUVEN CHAMBERS
16 KEEROM STREET
Capacity: **CAPE TOWN: RSA**
8001

Annexures

ZA1:

The Evidence on State Capture, Corruption, Fraud, Malfeasance and Mismanagement at that the Parliamentary Committee on Ethics Must Consider

The Public Protector's *Derailed* Report

97. *Derailed*, the 2015 report of the then-Public Protector Advocate Thuli Madonsela, remains virtually undisputed in most of its conclusions of corruption, malfeasance and mismanagement at PRASA under then Board Chairperson Mr Sifiso Buthelezi and Group Central Executive Officer, Mr Lucky Montana, and a cast of corrupt managers, staff, business operators and others. The remedial action ordered by the Public Protector has led to at least three further sets of reports – the Treasury Reports, the PRASA Reports – conducted by Werksmans – and the final Public Protector's Report released at the end of April 2019 by Advocate Busisiwe Mkhwebane.

The Treasury Reports

98. The *Derailed* Report contained remedial action that would require the National Treasury to investigate all contracts entered between PRASA and service providers above R10 million between 1 April 2012 and 30 June 2015. Treasury commissioned reports into approximately 216 contracts from about 14 legal and forensic auditing firms. These reports were completed late 2016. Even though these reports indicated that there was systematic corruption within PRASA at almost every conceivable level, no criminal prosecutions followed from their submission.

99. In October 2017, an undisclosed whistle-blower, hearing of #Unitebehind's mission to #FixOurTrains, leaked the Treasury Reports to the organisation through me. I have chosen not to reveal the name of the person who made the disclosure.

100. #UniteBehind gathered a team of 15 professionals working at universities, independent consultants and civil society bodies. I acted as conveyor of the body, and we produced a report titled #PRASALeaks. This report is summarised and attached (ZA3). However, there are several shortcomings in the Treasury Reports.

101. The limitations of the evidence in the Treasury are:

101.1. Despite the remedial action of the Public Protector that Treasury and PRASA submit the Terms of Reference, it appears that there was no common methodology.

101.2. The absence of a common methodology means that comparative analysis on findings and recommendations are very difficult.

101.3. The format of the reports is not fixed, and so the quality of the evidence and the conclusions is limited.

101.4. Most firms employed to investigate the contracts draw very conservative conclusions appearing to disregard the prescripts of the Public Finance Management Act. A few of the forensic auditors draw obvious legal conclusions and recommend criminal investigations and prosecutions.

101.5. The 2012-time limit of the Treasury Reports excludes many contracts entered into by the Buthelezi Board and the Montana management.

101.6. The reports that were leaked to us were not always the full reports, and often simply the executive summary. As such we were sometimes unable to evaluate whether a particular case required further investigation.

102. What is indisputable is that these investigations show that, under Lucky Montana and Sfiso Buthelezi, there was corruption, concealment, mismanagement, fraud and an organised state capture project at PRASA. A general review of the Treasury Reports is sufficient to show that prosecutions are necessary.

The Werksmans Attorneys Reports

103. The Werksmans Reports are probably the most controversial because of their scale and depth. Those who have sought to discredit the Werksmans Reports are primarily people who are directly implicated – such as Lucky Montana and Sfiso Buthelezi – or parliamentarians who failed to apply their minds. Charges against Werksmans include the fact that the costs of

the investigations were excessive (close to R300 million) leading to fruitless and wasteful expenditure; the appointment of the law firm was unlawful, and the investigations exceeded their mandate through spying or unlawful surveillance.⁴¹ However, there is no reason to question or disqualify the content of the Reports.

104. Though the bulk of the Werksmans work had been completed by 2016, these documents were not publicly released. In late 2018, these documents were released to #UniteBehind, who in turn released them to the news agency GroundUp, recognising that the contents of the reports were in the public interest. We also made them available to Parliament.
105. The Werksmans Reports are directed towards a smaller set of companies than the Treasury Reports. The Reports are company focused as the prevailing intention of the reports is to win back money for PRASA from corrupt tenderers, and not to pursue criminal action against individuals.
106. What is indisputable is that there are many instances of staggering criminality, both on the part of the executive and management of the rail agency, and on the part of private companies that did business with PRASA.

The Final Public Protector's Report

107. The investigations in the *Derailed* report were not complete and therefore the Public Protector committed to producing a second report that would consider all of the investigations done separately and actions taken to address the remedial action. This report

⁴¹ #UniteBehind holds no candle for Werksmans, we seek only to protect the integrity of reports that demonstrate almost beyond a reasonable doubt orchestrated corruption and state capture at PRASA. We agree with the detractors of Werksmans that the amount spent on the investigations appear to be excessive. However, this requires national regulation and capping on the fees charged by legal, accounting and investigating companies who milk the state. Werksmans is or was a formal part of the PRASA Legal Panel constituted under the PFMA, except, in the same way as the security contacts, this panel's term had expired nearly a decade or more ago. The Montana-controlled Supply Chain Management team had inexplicably failed to finalise a tender to establish a new Legal Panel and the roll-over and extension of the contracts of all the law firms on the panel was unlawful. As to the unlawful nature of the investigations as claimed by Montana and others, their incorrect and spurious claims can be objectively tested.

was issued in April 2019 and #UniteBehind has taken this matter on review to the North Gauteng High Court (discussed below).

Court Records

108. There have been several court cases regarding State Capture at PRASA. Most of the matters have been brought by PRASA, some have been brought by companies implicated in corruption seeking payments from the rail agency, others are matters brought by #UniteBehind against PRASA or matters where we joined PRASA against corrupt companies. These court records are largely public except for about 7000 sealed pages in the matter between *PRASA (Applicant) v Directorate of Priority Crime Investigations and the National Prosecution Authority*. The Howarth forensic report into Swifambo for the DPCI by Ryan Sacks has been unsealed and is available on the State Capture Commission website.
109. The following matters are before the Courts or have been completed and their records are available for scrutiny:
- 109.1. *PRASA v Swifambo Rail Leasing Agency* (completed),
- 109.2. *PRASA v Daniel Mthimkhulu* (High Court trial completed),
- 109.3. *PRASA v Siyangena* (First High Court review – matter dismissed because out of time),
- 109.4. *PRASA v Siyangena and #UniteBehind (amicus curiae)* High Court set contracts aside and Siyangena appealed to the Supreme Court of Appeal. The SCA reserved
- 109.5. *PRASA v Siyaya* (rescission – finalised),
- 109.6. *#UniteBehind v Siyaya, Sheriff of the High court and PRASA* (withdrawn because of the subsequent action by PRASA against Siyaya in the North Gauteng High Court),
- 109.7. *Molefe and Others v Minister of Transport and Others* (finalised),

- 109.8. *#UniteBehind v PRASA and the Minister of Transport* (governance matter finalised through settlement and withdrawal)⁴²,
- 109.9. *#UniteBehind v PRASA, Information Officer of PRASA and the Minister of Transport* (Access to Information on security contracts and criminal records),
- 109.10. *PRASA (Applicant) v Directorate of Priority Crime Investigations and the National Prosecution Authority with OUTA intervening*,
- 109.11. *#UniteBehind and Others v PRASA and Others* (Interdict on threats, violence and intimidation),
- 109.12. *#UniteBehind v Minister of Transport and Others* (Minister Mbalula's unlawful appointment of Mr Bongisizwe Mpondo as PRASA "administrator" judgment was granted with costs in favour of #UniteBehind),
- 109.13. *#UniteBehind v Minister of Transport and Others* (Case No: 19976/19) WC High Court on safety plan,
- 109.14. and
- 109.15. *#UniteBehind v Public Protector* (Review of Second Report).
110. The court records when used individually are limited because they handle discrete matters, but when read together speak to a project of state capture and the collapse of PRASA services. The matters deal with Ministerial interference; Board overreach and legality; and corruption by local and international companies while the recurring names of PRASA executives, managers and supervisors who defy the Constitution, the PFMA and others illustrate a criminal network. The *PRASA against the DPCI (Hawks) and NPA* case, together

⁴² In December 2017, a special meeting of the Makhubele Board of Control decided that they would cancel the Werksmans investigations; #UniteBehind challenged this decision in court and gained access to the recording and transcript of this meeting through court order.

with the #UniteBehind matter against the current Public Protector, illustrates the capture or connivance of investigating and oversight bodies.

Judgments in PRASA state capture and safety matters

111. The following judgments of the High Courts, Supreme Court of Appeal and Constitutional Court related to PRASA must guide the work of the Parliamentary Ethics Committee and – except for the *Mthimkhulu* matter, which is on appeal – they are final:

111.1. *PRASA v Swifambo Rail Leasing Agency* (High Court and Supreme Court of Appeal),

111.2. *Molefe and Others v Minister of Transport and Others* (finalised),

111.3. *PRASA v Siyaya* (rescission – finalised),

111.4. *PRASA v Siyangena & #UniteBehind (amicus curiae)*, and

111.5. *PRASA (Applicant) v Directorate of Priority Crime Investigations and the National Prosecution Authority with OUTA intervening* (Judgment on Molefe's standing to bring the application and OUTA's admission as a party).

112. As stated above, these judgments have set a legal framework that measures functionality and state capture, but they represent more than this. The judgments illustrate the resistance to state capture, corruption and dysfunctional services by PRASA employees, previous Board members, commuters and organisations such as #UniteBehind and OUTA.

Complaints to the Judicial Services Commission, the Pretoria Bar Council and High Court Application

113. The judiciary has been a bulwark against corruption, state capture and the attempts to destroy bodies such as the NPA, the DPCI and Parliament. In the PRASA state capture matters, the role of newly appointed Justice Nana Makhubele at the rail agency stands out as one of the exceptions to the integrity and independence of the judiciary. Former Minister of

Transport, Mr Maswanganyi's unlawful appointment of Justice Makhubele as chairperson of the Interim PRASA Board of Control is the direct result of this illegality. Various complaints and their outcomes will also be placed on the record before the Parliamentary Ethics Committee as evidence of state capture at PRASA. They include:

- 113.1. Justice Makhubele's complaint to the Judicial Service Commission against Justice Neil Tuchten for his remarks about her questionable role as Chairperson of the PRASA Board of Control and her unexplained, irregular intervention in the *Siyaya* matters.
- 113.2. Justice Tuchten's responses to Justice Makhubele.
- 113.3. The judgment of Western Cape Deputy-Judge President in the matter between Justices Makhubele and Tuchten.
- 113.4. Justice Makhubele's complaint to the Pretoria Society of Advocates against Advocate Francois Botes (SC).
- 113.5. #UniteBehind's complaint against Justice Makhubele to the JSC.
- 113.6. The finding against Justice Makhubele the Judicial Conduct Committee.
- 113.7. *TAN Makhubele v the Judicial Services Committee and Others* (#UniteBehind was one of the parties sued by Justice Makhubele. She withdrew the matter and tendered costs. The Court record is important.)

#UniteBehind Documents

114. #UniteBehind has had a range of engagements with PRASA, Parliament, the Presidency and foreign government representatives related to state capture and the general operational crisis at the commuter rail agency. They include:
 - 114.1. Letters to the PRASA Board of Control,
 - 114.2. Letters and Submissions to Parliamentary Portfolio Committee on Transport,

- 114.3. Letters and Submissions to President Cyril Ramaphosa,
 - 114.4. Letters to German and European Union Ambassadors on Vossloh and Swifambo,
 - 114.5. Letters between #UniteBehind and the National Prosecuting Authority, and
 - 114.6. #UniteBehind statements, leaflets and other documents.
115. The evidentiary value of these documents is in the facts they contain on engagement, state capture and the failure of the various authorities to respond with the urgency required to deal with the consequent operational disaster at PRASA. This is nowhere more evident than the crisis of life and death on the trains.

Audio-Visual and social media material

116. #UniteBehind will submit a diminutive sample of commuter social media traffic on WhatsApp and Facebook, as well as its own audio-visual material. Specifically:
- 116.1. Video taken with a phone at Mutual Station in Cape Town during peak hour demonstrating over-crowding,
 - 116.2. Video of Shameese Abid whose son Keeno was killed on the trains in 2018, and
 - 116.3. Various samples of social media.
117. These videos, Facebook posts and WhatsApp messages illustrate the plight of commuters. Should the Commission require, the administrators of the various WhatsApp groups based on the different rail lines (Central, Southern, Northern, Cape Flats and their sub-lines) would be willing to testify.

Additional Leaked Documents on Security and Other Matters

118. The protected disclosures include matters of security, state capture, unlawful conduct including theft and corruption, and are listed below:

- 118.1. Letters and court settlement between the Private Security Regulatory Authority (PSIRA) and PRASA on the failure to register security personnel,
- 118.2. Memo by the Western Cape Regional Security Head, Mr. Ernest Hendricks to Mr. Tiro Holele at PRASA Head Office on the state of PRASA,
- 118.3. Letters between PRASA and VBS executives, and
- 118.4. Provisional Western Cape Public Protector's Report on Mthura Swartz and other documents pertaining to his unlawful conduct.

Media Reports

119. Finally, we will place on record a compendium of media reports from news agencies who have focused on PRASA. They include:

- 119.1. GroundUP
- 119.2. News24 Group
- 119.3. Daily Maverick
- 119.4. AmaBhungane

120. The conspectus of the evidence above (and more) paints a picture of a rail agency that requires a disaster management plan. PRASA was captured by the corrupt inside and outside the organisation, mismanaged by a criminal network committed to self-enrichment rather than professional ethics and competence, misgoverned, ill-led and its resources plundered by profiteering companies in Europe and at home. All the evidence, despite its limitations, also points to possible solutions.



#UNITE BEHIND

A JUST AND EQUAL SOUTH AFRICA

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Submission to the Portfolio Committee on Transport on State Capture, Governance and an Emergency Safety Plan

6 February 2018

Introduction to #UniteBehind

- 1 We present this submission on behalf of #UniteBehind, a voluntary association of people's movements, legal, policy and support organisations advocating for justice and equality. The 20+ organisations which constitute #UniteBehind include, among others, the Alternative Information and Development Centre, the Centre for Environmental Rights, Women's Legal Centre, Social Justice Coalition, Ndifuna Ukwazi, Equal Education, Women and Democracy Initiative (Dullah Omar Institute), Right2Know (Western Cape) and UDF Veterans Network. These organisations are supported by communities of faith such as the Western Cape Religious Leaders Forum and the South African Council of Churches and the Muslim Judicial Council. #UniteBehind is predominantly Western Cape-based but many of our constituent organisations operate across the country.
- 2 #UniteBehind emerged out of the Cape Town Ahmed Kathrada Memorial, held on 6 April 2017. This event brought together thousands of people from across Cape Town, equally motivated to honour the memory of Comrade Kathy and to protest the assault on the democratic state which at that time had just been epitomised by the cabinet reshuffle that saw the removal of Pravin Gordhan and Mcebisi Jonas from the Ministry of Finance. Gordhan addressed the memorial along with activist leaders from Black African and Coloured communities from across the Cape Flats.
- 3 Our key mission in #UniteBehind is to build a just and equal society where all people share in the country's wealth, participate in the decisions that affect their lives, and where the environment is sustainably protected for future generations. One of our central demands is the building of a safe, reliable, affordable, efficient and quality public transport system, in particular a commuter rail

service. Dealing with the endemic corruption, state capture, political interference by the Executive, incompetence and maladministration at the Passenger Rail Agency of South Africa (PRASA) is one of our most immediate and urgent campaigns to give effect to the right to safe, reliable, efficient rail transport for all.

URGENT LEADERSHIP INTERVENTIONS REQUIRED FROM PARLIAMENT; A NEW PRASA BOARD AND EXECUTIVE MANAGEMENT

4 Safety and security represents an urgent emergency and PRASA is mired in state capture, corruption, mismanagement and maladministration. The crisis in safety and security cannot be adequately resolved without simultaneously addressing the crisis in governance and management. We therefore request the following urgent action to bring relief to workers, students, communities and the economy.

4.1 The Passenger Rail Agency of South Africa (PRASA) will not emerge from the current crisis unless and until a new board is appointed. Cabinet must instruct the Minister of Transport to appoint a credible new board with the requisite qualifications, experience, skills and competencies.

4.2 All those implicated in corruption, mismanagement, maladministration must be removed from PRASA. Parliament must instruct the Board to continue investigations and to support all criminal and civil proceedings against those involved in state capture and corruption at the rail agency.

4.3 Investigations must be concluded and the rapid prosecution of cases against all those involved in the criminal enterprise to capture PRASA must be prioritised. In particular, Sfiso Buthelezi, Makhensa Mabunda, Lucky Montana, Mthura Swartz, Roy Moodley, Mario Ferreira, Arthur Fraser, Manala Manzini, Auswell Mashaba, Josephat Phungula, Chris Mbatha, Daniel Mthimkulu, Rebecca Setino, Maishe Bopape and Ernest Gow have cases to answer based on all the available evidence. See our attached annexures and submission to Parliament for further details on the above individuals.

4.4 Criminal investigations must also include international companies such as Vossloh Espana/Stadler Rail which has stolen billions of rand through contracts like Swifambo Rail (locomotives). The relevant European regulatory authorities must be contacted.

- 4.5 A qualifications, skills, competencies and life-style audit is urgently needed for PRASA management at every level, starting with head office and its Western Cape region. The new Board must lead this audit to ensure that people's needs are prioritised and the economy (particularly in Cape Town where the rail system forms the backbone of all public transport) is stabilised.
- 4.6 All PRASA appointments must be merit based with open competition. Only appropriately qualified, skilled, competent and experienced people must be appointed at managerial and supervisory levels.
- 4.7 An urgent safety plan is needed to enable commuters to travel without constant fear of being crushed to death, thrown from the train or attacked by criminals. We believe the following are among the immediate steps required:
- 4.7.1 The reopening of the Central Line with adequate security.
- 4.7.2 Security employed by PRASA must be qualified and PSIRA compliant. They must be supported by the South African Police Service and the Law Enforcement Officers of the City of Cape Town. All current security employees must be assessed; where possible redeployed and trained. Those with serious criminal records must be dismissed.
- 4.7.3 The protection of commuters and all workers, particularly women, children and other vulnerable people, must be prioritised. This can be partially achieved through securing of stations and their surrounds (including proper lighting and CCTV surveillance).
- 4.7.4 Separate compartments are needed for women, children and differently abled commuters. This has been successfully implemented in other countries such as India. Organisations such #UniteBehind and the broader commuting public must be involved in the development of a plan with clear objectives; targets; deadlines and budgets.
- 4.7.5 Specific details and timeframes for any such safety plans or measures be communicated to all commuters.

- 4.8 In Cape Town the passenger rail service must be coordinated and at an appropriate time transferred to the relevant local authority as contemplated the Draft White Paper of the National Rail Policy – June 2017. Much of our work involves campaigning against the anti-poor and anti-black policies of the City of Cape Town’s DA administration, but in this instance the City has made a realistic set of recommendations which should be taken seriously. Most importantly however, is that the National Land Transport Act requires that all land transport including rail be integrated with municipal transport. This international standard is crucial to the provision of efficient, accessible and reliable integrated transport systems in our metros.
- 4.9 Alternative forms of transport, like busses, must urgently be provided to commuters who ordinarily use lines that are currently suspended or those facing constant delays.
- 4.10 In the medium term we need a proper plan: How do we stop delays? What new rolling stock is needed? Is there surplus rolling stock elsewhere? Which of the existing coaches, not in use, could be upgraded rapidly?
- 4.10.1 As much as possibly such rolling stock must be manufactured and procured locally to develop our manufacturing sector, creating employment and stimulating growth.
- 5 The above recommendations combine a set of priorities for parliament, a new board, and a Minister of Transport to stabilise the passenger rail service in every region. Government (all its different arms and spheres) cannot save our rail service alone. People who use public transport, business, trade unions, schools and communities and #UniteBehind stand ready to assist.

THE URGENT ISSUES FACING PRASA COMMUTERS OF SAFETY AND SECURITY AND THE COLLAPSE OF SERVICE

- 6 The lack of safety on our country’s passenger trains is a daily nightmare.
- 7 PRASA and Metrorail have never complied with the Constitutional Court’s 2004 judgment and subsequent Court Order of 2009 in *Rail Commuter Action Group and 54 Others v Transnet Limited t/a Metrorail and 3 others* (see Annexure 1). This was a matter brought forward by Leslie van Minnen who tragically lost his son, COSATU, and many others.
- 8 PRASA Western Cape Region currently sources largely incompetent, unregistered and unskilled

security personnel who cannot protect themselves, passengers or the assets of the agency. Many have criminal records. For more information see the 31 May 2017 letter sent by PRASA's Mr Ernest Hendricks, Regional Security Manager, to Mr Tiro Holele and PRASA's Corporate Office (see Annexure 2). Over 80% of the security staff in the Western Cape are not registered with the Private Security Industry Regulatory Authority (PSIRA). Alarming the majority of this group are so-called Military Veterans who cannot be registered because they have criminal records. As #UniteBehind wrote, in a letter to Minister of Transport, Mr Mkhacani Joe Maswanganyi, on 18 October 2017, the manner in which security guards have been appointed and the failure to protect people and assets "can only be described as criminal negligence". (See Annexure 3)

- 9 The impression of criminal negligence was amplified when we were provided with a copy of a business plan prepared by the City of Cape Town, sent some time ago to PRASA Western Cape, offering that "an additional 100 law enforcement officers be added to the City's resources – split 40% to focus on infrastructure (cable theft and vandalism) and 60% on commuter safety." This offer was not responded to by PRASA. (see Annexure 4)
- 10 #UniteBehind has sent a letter demanding among other things an urgent safety and security plan to PRASA Western Cape's Regional Manager, Richard Walker, on 12 January 2018 (see Annexure 5).

GENERAL CRISIS AT PRASA: COLLAPSE OF THE SERVICE

- 11 The Rail Safety Regulator has reported that there were 495 fatalities, 2079 injuries, and 73 derailments or collisions of PRASA trains, in 2016/17 (see Annexure 6). Most recently there was a derailment or collision:
 - 11.1 derailment at Bellville Station where 10 passengers were injuries - 18 August 2017
 - 11.2 derailment at Plumstead Station – 1 November 2017;
 - 11.3 collision and derailment in the Free State where 254 passengers were injured and 18 were killed – 4 January 2018;
 - 11.4 in Germiston where over 226 passengers were injured;
 - 11.5 in Germiston – 17 January 2017;

11.6 on the Cape Town Central Line (Still suspended) where four trains derailed on a test run for the resumption – 18 January 2018.

- 12 The Central Line, servicing over 120 000 commuters whom are overwhelmingly working-class and poor African and Coloured, has been shut down since the 8th of January 2018 after a security guard was murdered. This has cascaded to other sectors of public transport causing unrest for bus and taxi commuters as well.
- 13 Around 43% of former passengers (~248 500) have stopped using the trains over the past four years¹; on average over 45% of trains are late and around 16% of all trains are cancelled (July 2017)², with the exception of the Central Line, which has faced far worse collapse.
- 14 Up to 57% of trains have been cancelled during certain weeks on the Central Line, with an overall 400% increase in train cancellations in the Western Cape between 2015 and 2017³.
- 15 We have reason to believe that PRASA's management team at a national and regional level, is incompetent and dysfunctional. This stems from a decade of state capture, corruption, mismanagement and maladministration.

STATE CAPTURE, CORRUPTION AND MALADMINISTRATION

- 16 In August 2015, then Public Protector Advocate Thulisile Madonsela published her report "*Derailed*" (No.3 of 2015/16) based on 32 complaints of maladministration, procurement irregularities and corruption at PRASA. Her report dealt with serious allegations of tender fraud, nepotism, corruption and conflicts of interest involving former CEO Lucky Montana, amongst others. The Public Protector found that 19 of the 32 complaints were substantiated.
- 17 A new PRASA Board was appointed in August 2014, under the chairmanship of Mr Popo Molefe. On receiving the *Derailed* report, he set about addressing the extremely serious findings and binding

¹ TDA Cape Town. Comprehensive Integrated Transport Plan 2017 – 2022. (Report by City of Cape Town Transport and Urban Development Authority - 2017), pg. 41.

² Metrorail: Western Cape, Key Stakeholder Engagement Presentation – September 2017

³ Nceba Hinana, *A 400% increase in train cancellations worries the Western Cape*. (Business Day, 2017). Available: [<https://www.businesslive.co.za/bd/national/2017-08-15-a-400-increase-in-train-cancellations-worries-the-western-cape/>]

remedial actions. According to a statement by Mr Molefe in 2017:

“in accordance with the recommendations of the erstwhile Public Protector in her report entitled *Derailed*, to address long-standing corruption and governance issues at PRASA... the board instituted and completed significant investigations at PRASA and, consequently, embarked on litigation to unwind unlawful and corrupt transactions... vindicated most recently by the judgment of Francis J in *PRASA v Swifambo Rail Leasing (Pty) Ltd*, in terms of which PRASA succeeded in setting aside an unlawful contract amounting to approximately R2.6bn... also taken steps to compel the law enforcement agencies, including the National Prosecuting Authority and the Directorate for Priority Crime Investigation, to act against the wrongdoers.”

- 18 A crucial remedial action ordered by the Public Protector directed PRASA to assist the National Treasury in investigations of all contracts above R10 million for the period 2012-2015.
- 19 These investigations, commissioned by National Treasury, and conducted by 13 different prominent law firms and forensic agencies, implicate among others the current Deputy Minister of Finance Mr. Sifiso Buthelezi (former PRASA Board Chairperson) in possible criminal conduct along with politically connected persons known to President Jacob Zuma including Mr. Roy Moodley, Arthur Fraser, Mr. Makhensa Mabunda and Mr. Mario Ferreira.
- 20 The reports reveal a systematic effort to loot the rail agency.
- 21 The major companies directly implicated include S-Investments or the “S Group” which includes Siyaya Energy, Siyaya DB Consulting Engineers and Siyaya Rail Infrastructure Solutions and Technology. Swifambo, Voslo Espana, Royal Secutity, Resurgent Risk Management and Tshireletso Enza Construction are also directly implicated although these latter three are not dealt with further in this letter.
- 22 R15bn was the total value of the contracts investigated by Treasury for contracting periods between 2012-2015. Specifically, R2.5bn can explicitly be attributed to “irregular” and unlawful expenditure. Another R3.5bn is unverifiable due to missing documentation. The extent of missing documentation and/or missing steps in the procurement process can be attributed to fraud with criminal intent.
- 23 All the investigators for the Treasury report cited a lack of proper record keeping and missing

documentation. In many instances the audit trail was destroyed and where it could be followed it showed lack of compliance with the PRASA's supply chain management process and the PFMA.

- 24 Tenders were awarded without any needs analysis having been conducted.
- 25 Tender and contract rigging was found to be commonplace. Where competitive tendering processes were followed on the surface, the specs and scoring were rigged to allow preferred suppliers to win.
- 26 The reports of these Treasury investigations were leaked to #UniteBehind and became known in the media under the heading #PrasaLeaks. #UniteBehind published a detailed report on the basis of the #PrasaLeaks. (See Annexure 7)
- 27 In 2015 the Auditor General issued several adverse findings against the PRASA board and management. However, it is noteworthy that the Auditor General failed to come close to detecting and exposing the systemic rot, corruption and fraud which has been ongoing for years.
- 28 Notably, the Parliamentary Portfolio Committee on Transport failed totally to hold PRASA accountable to date.
- 29 Further, on 3 July 2017, in setting aside the corrupt Swifambo tender award, Justice Francis stated as follows:

“This case concerns corruption by a public body concerning a tender that will affect the public for decades to come... Harm has been done in this case to the principle that corruption should not be allowed to triumph. Harm will be done to the laudable objectives of our hard-fought freedom if I was not to set aside the award. Harm will be done to all the hardworking and honest people of our land who refrain from staining themselves with corruption... Harm will be done if the benefactors of the tender were allowed to reap the benefits of their spoils... Corruption will triumph if this court does not set aside the tender.”

- 30 Even a cursory perusal of the Auditor General's 2015 report, the Public Protector's '*Derailed*' report, the judgment in *Swifambo* and the affidavits filed in other matters, gives much reason to suspect that offences listed in Chapter 2 of the Prevention and Combatting of Corrupt Activities Act 2004 have been committed in relation to PRASA.

- 31 Most seriously, despite mountains of evidence of systemic corruption and state capture at PRASA, the Hawks and NPA have failed to act for more than two years (See paragraph 33.3).

PRASA, UNDER FORMER CHAIR POPO MOLEFE, GOES TO COURT TO RECOVER LOOTED FUNDS

- 32 During 2017 PRASA, on instructions from its then-Board of Control, under the chairmanship of Mr Popo Molefe, instituted legal proceedings against various companies, entities and individuals to addresses lapses in governance and recover looted funds. The institution of these legal proceedings followed the forensic investigation that was instituted by the BoC under Molefe and the report of the Public Protector entitled “Derailed”.

- 33 The legal proceedings brought by PRASA were:

33.1 Siyangena Technologies (Pty) Ltd: This is a review application against an award of two contracts to Siyangena for installing security systems at 200 PRASA stations. Former Group CEO, Lucky Montana, and the Project Manager on this project, Luyanda Gantsho, are implicated. Gantsho has admitted to investigators that he received the beneficial use of a penthouse apartment. PRASA’s court papers alleged that Montana had received kickbacks of R4.9-million. PRASA’s internal legal department (see Annexure 8) are confident of success in the review because the Constitutional Court has recently changed the law to allow a public entity to review its own decision and because new evidence has emerged that shows that Siyangena knew the contracts were irregular.

33.2 Swifambo Rail Agency (Pty) Ltd (Case No. 2015/42219): This is the famous case where 70 diesel-electric locomotives were acquired that exceeded the maximum height specified. The tender was worth R3.5bn. (For further details see from paragraph 68 below.) Justice Francis set aside the corrupt contract with a scathing judgment on numerous grounds including likely rigging of the tender, Swifambo’s lack of tax clearance, PRASA’s failure to secure approvals required by the PFMA and various other grounds. Swifambo was granted leave to appeal and the appeal is underway.

33.3 Directorate of Priority Crimes Investigation and the National Prosecuting Authority (Case No. 36337/17): This application is for an order directing the Hawks and the NPA to investigate complaints laid by PRASA in respect of Swifambo and Siyangena. To date the

Hawks have refused, saying that when he signed an affidavit on behalf of PRASA, as Chairperson of the Board, which he then was, Dr Popo Molefe lacked the required authority.

33.4 KPG Media: In this litigation PRASA cancelled an irregular tender based on evidence and findings in the Public Protector's 'Derailed' report. KGP Media attempted to interdict the cancellation but PRASA opposed this application successfully up to the Supreme Court of Appeal

33.5 A case challenging the unlawful dismissal of the previous Board of Control by Ms Dipuo Peters, former Minister of Transport (Case No. 17748/17)

34 Apart from the last two matters, all the others are either pending or on appeal.

35 PRASA is also involved in arbitration with Siyaya before Justice Brand (see paragraph 65 below).

36 It is important to note that PRASA has still not instituted any litigation flowing from the investigations of the National Treasury.

ATTEMPTS TO 'DERAIL' THE INVESTIGATIONS

37 The then Minister of Transport, Dipuo Peters, in August 2016, announced that the investigations into corruption that Werksman's Attorneys had been commissioned to carry out were to be curtailed.

38 In March 2017, Peters went a step further and attempted to remove the PRASA board. This was successfully resisted in court as "unlawful" and "irrational".

39 President Zuma replaced Peters with Joe Maswanganyi in the cabinet reshuffle at the end of March 2017. However, according to Mr Molefe, the same pattern continued:

"The current minister of transport has, however, continued to attempt to thwart the operations of PRASA and prejudice its attempts to address Derailed... the new minister has refused to meet with the board; despite repeated requests... rather than dealing with the critical substantive issues and supporting the work of the board, Minister notified the board of his intention to remove the Board in June 2017; and the minister has undermined the

authority of the board, including its authority to complete its investigations and take steps in addressing corruption at PRASA. The current minister's actions, unfortunately, dovetail with those of his predecessor, who once instructed the board to 'stop' the investigations; did not appoint a permanent CEO even after the board had followed all due processes; and unlawfully terminated the board's service prematurely and was rebuked by the court for having done so."

- 40 Mr Molefe's term ended on 31 July 2017. Since he left corrupt practices appear to have re-emerged, commencing with the appointment by the Minister of Transport, of an "Interim Board"
- 41 The Ministers of Transport at the relevant times: Ben Martins, Dipuo Peters and now Joe Maswanganyi appear to have deliberately turned a blind eye to corruption and mismanagement. In the cases of Peters and Maswanganyi, there appears to be collusion to obstruct justice.

UNLAWFUL APPOINTMENT OF AN "INTERIM" BOARD OF CONTROL "UNTIL FURTHER NOTICE"

- 42 The Minister of Transport appointed "an interim" Board of Control (BoC) for the Passenger Rail Agency of South Africa (PRASA) "until further notice", on the 19th of October 2017. This appointment is unlawful in terms of the Legal Succession to the South African Transport Services Act 9 of 1989 (the Legal Succession Act), which does not allow for the appointment of an "interim board". In the litigation referred to in paragraph 71.5, #UniteBehind has asked the Court to review the decision and to find that the BoC was improperly constituted.

THE INAPPROPRIATE APPOINTMENT OF JUSTICE MAKHUBELE AS PRASA INTERIM BOARD OF CONTROL CHAIRPERSON

- 43 On 5 October 2017, the Judicial Services Commission (JSC) formally recommended for appointment Adv Tintswalo Annah Nana Makhubele SC as a judge in the Gauteng High Court. This followed Makhubele's interview before the JSC.
- 44 On 19 October 2017, Makhubele was appointed by Mr. Joe Maswanganyi, Minister of Transport, as the Chairperson of the Interim Board of Control of PRASA "until further notice". The Minister seems not to have been concerned that he was appointing an Interim Chairperson who had already been recommended for appointment as a judge.

- 45 Two weeks later, on 2 November 2017, Makhubele was indeed appointed by President Zuma as a Judge of the Gauteng Division of the High Court, with effect from 1 January 2018.
- 46 Makhubele confirmed her impending appointment as a judge in her report to the Parliamentary Portfolio Committee on Transport chaired by Ms Dikeledi Magadzi (MP) on 24 November 2018.
- 47 To this day, Makhubele remains Chairperson of the Interim Board of Control of PRASA.
- 48 Based on the above, #UniteBehind is concerned about a breach of the separation of powers. As chairperson of the interim PRASA Board of Control, Justice Makhubele is carrying out functions in the executive domain and is accountable to the Minister of Transport, Parliament, the Minister of Finance and the Auditor-General. Further, #UniteBehind is concerned about the possibility that the standing of the judiciary could be damaged by one of its incoming members appearing to condone ill-gotten gains.
- 49 The Constitutional Court dealt with this question in relation to former President Mandela's appointment of Justice Willem Heath as Head of the Special Investigating Unit. In *SA Association of Personal Injury Lawyers v Heath and Others* (CCT27/00) [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 (28 November 2000) the late President of the Constitutional Court, Arthur Chaskalson, held the following when declaring Heath's appointment unlawful:

“Under our Constitution, the judiciary has a sensitive and crucial role to play in controlling the exercise of power and upholding the bill of rights. It is important that the judiciary be independent and that it be perceived to be independent. If it were to be held that this intrusion of a judge into the executive domain is permissible, the way would be open for judges to be appointed for indefinite terms to other executive posts, or to perform other executive functions, which are not appropriate to the “central mission of the judiciary.” Were this to happen the public may well come to see the judiciary as being functionally associated with the executive and consequently unable to control the executive's power with the detachment and independence required by the Constitution. This, in turn, would undermine the separation of powers and the independence of the judiciary, crucial for the proper discharge of functions assigned to the judiciary by our Constitution. The decision, therefore, has implications beyond the facts of the present case, and states a principle that is of fundamental importance to our constitutional order.”

- 50 #UniteBehind wishes to place on record that we have the fullest confidence that judges in our democratic constitutional dispensation have followed the prescripts of the separation of powers because not one member of our judiciary has since occupied post in the executive's domain. Justice Makhubele is the only such appointment.
- 51 You will find annexed a confidential letter (see Confidential Annexure 9) sent to #UniteBehind by the appropriate ranking member of the judiciary in which #UniteBehind is advised of the steps being taken by said ranking member of the judiciary to manage the problems in regards to Justice Makhubele. The annexed letter was in response to a letter from #UniteBehind. We have not currently laid a complaint with the Judicial Services Commission pertaining to Justice Makhubele because we believe such a course of action can be averted along with any unnecessary tension or conflict. However, we believe that Justice Makhubele must resign from the Interim Board with immediate effect.
- 52 The latest egregious act of irregular and possibly corrupt action shows that under the Transport Minister Joe Maswanganyi and his "Interim" Board chaired by Justice TAN Makhubele, a decision was taken to "invest" R1 billion allocated to capital projects in the VBS Bank. President Jacob Zuma's unlawful expenditure on Nkandla was paid through this bank and in the attached memorandum we show that he has benefitted directly from state capture at PRASA. Since at least November 2017, PRASA has been involved in negotiations with VBS Bank and unlawfully committed to invest monies allocated to improve commuter rail services. The Minister of Transport Joe Maswanganyi, Justice Makhubele and her Board colleagues along with most of the Executive Management are ethically and legally compromised. #UniteBehind has gained access (through whistle-blowers) to letters between PRASA and the VBS Bank. We will provide annexures after this hearing.

THE RECKLESS APPOINTMENT OF MTHURA SWARTZ AS ACTING PRASA RAIL CEO

- 53 On 3 January 2018, the Acting Group CEO of PRASA Mr. Cromet Molepo (who was himself improperly appointed by the unlawfully appointed Interim Board of Control) announced the appointment of a certain Mr. Mthura Swartz as head of PRASA Rail, the main subsidiary in the group.
- 54 Mr Molepo was appointed despite the fact that he was suspended by KwaZulu-Natal's Umgeni Water on grounds of serious financial conduct, illegal tapping of communications, and unauthorised expenditure. He resigned in order to prevent disciplinary action being taken against him. Molepo's

appointment of Swartz also features in our legal challenge mentioned in paragraph 71.5 above.

- 55 It is extraordinary that this appointment happened only days after PRASA's own lawyers, from a large reputable law firm, advised PRASA management to immediately suspend Mr. Mthura Swartz who was then Executive Manager for PRASA Mainline Passenger Services. This advice was given on 28 December 2017. The basis for the advice was because complainants and witnesses in new matters of victimisation, intimidation, irregular procurement processes and sexual harassment feared for their jobs and/or personal safety. Instead of suspension, Mr. Swartz was on 1 January 2018 promoted to the position of Acting PRASA Rail CEO where he has power and control over all whistle-blowers, complainants, potential witness and documentary evidence.
- 56 On 5 January 2018, we addressed a letter to Justice Makhubele (see Annexure 10) pointing out the following:
- 56.1 Mr. Swartz has provisional findings against him by the Western Cape office of the Public Protector for maladministration, specifically the improper appointment of unqualified and unskilled persons to senior security positions;
- 56.2 The Directorate for Priority Crime Investigation (DPCI) ("the Hawks") in the Eastern Cape is investigating Mr Swartz (now the head of PRASA's rail division) for organising the theft of rail lines and sleepers as well as corruption (Elliott CAS 35/02/2013);
- 56.3 Earlier in his career, Swartz was found guilty by the City of Cape Town on 8 charges relating to an irregular tender and over-payment by R6m.
- 56.4 At PRASA, Swartz appointed senior security staff members despite them lacking the necessary qualification, security clearance, firearms training and Private Security Industry Regulatory Authority registration (see Annexure 11 for further details on this.)
- 56.5 Swartz is likely to face charges for a corrupt relationship with Spanish Ice, a "logistics company" used to transport the stolen PRASA assets.
- 56.6 We are reliably informed that sufficient evidence on oath exists to suspend Swartz on grounds of sexual harassment, victimisation, intimidation, irregular procurement and corruption.

56.7 As shown above, PRASA was advised on 28 December of the need to suspend Swartz, before he was promoted.

57 To date, we have not received any acknowledgment of, or reply to, our letter to Justice Makhubele that might provide a reasonable explanation for Swartz's appointment and continued presence at PRASA.

DECISION OF THE "INTERIM" BOARD UNDER JUSTICE MAKHUBELE TO SUSPEND PRASA'S LEGAL PANEL, ENDANGERING LEGAL PROCEEDINGS AGAINST LOOTING

58 On 1 December 2017, the interim BoC, under the chairpersonship of Justice Makhubele, convened a special meeting at the PRASA Corporate Office in Hatfield in Pretoria, at which various resolutions were taken.

59 One of these decisions was to suspend PRASA's legal panel, i.e. the group of attorneys that had provided legal services to PRASA for years. These were, of course, the attorneys working on all of the above cases intended to recover funds looted from PRASA. Instead, the BoC decided, any legal services were to be sourced not through Group Legal Services, but through PRASA's Supply Chain Management (SCM) department.

60 This decision received strong opposition from professionals within PRASA. On 5 December 2017, PRASA's Group Executive for Legal, Risk & Compliance, Martha Ngoye and General Manager for Group Legal Services, Fani Dingiswayo, sent Interim Chairperson Makhubele a 15-page memorandum (see Annexure 12) in which they detailed their strong objections to the Interim Board's decision. They wrote: "We do not support the part of the draft resolution that states that procurement of legal services should be done through the SCM Department."

61 The memorandum expressed a number of fundamental concerns:

61.1 It says that the Board resolution "appears to be a termination of the panel of attorneys and not a suspension thereof".

61.2 It says and that the decision ignores "the risks of not having a panel of service providers that service PRASA on a daily basis". It explains: "There is always a need for legal advice and representation for project-related work, personal injury, labour issues that arise etc. It is not an exaggeration to indicate that this occurs almost daily. Without a list of service providers who

are immediately available to PRASA, the work of [Group Legal Services] GLS will be severely hampered.”

61.3 That the Supply Chain Management (SCM) department to which the BoC has now delegated authority to procure legal services is in a “parlous state”, “paralysis” and that twice in three years the SCM Department showed itself to be “inept to procure a panel of attorneys”. They noted to the BoC that the SCM Department was event unable to provide PRASA with ink charges or paper for over a month. “Our view”, the memorandum states, “is that they cannot be entrusted with the responsibility to procure legal services almost every day.”

62 #UniteBehind has reason to believe that the decision to disband the legal panel is partly intended to scupper the attempts detailed at paragraph 33 above, against companies such as Siyangena and Swifambo to recover looted funds.

63 Further, #UniteBehind has received credible information and has reason to believe that the decision to disband the legal panel is partly intended to enable the settlement of all disputes with the S-Investments (which included Siyaya) companies of Mr. Makhensa Mabunda.

S-INVESTMENTS AND MAKHENSA MABUNDA

64 S-Investments is a company whose sole director is Makhensa Mabunda, a former government official and erstwhile colleague of Lucky Montana, PRASA's former CEO. Mabunda and S-Investments control Siyaya and are strongly linked to Swifambo.

65 Siyaya DB Consulting Engineers (Pty) Ltd (now in liquidation) and Siyaya Rail Solution (Pty) Ltd, are implicated in significant corruption and payments to them have been halted pending arbitration. The BoC's apparent intention to forego the arbitration and settle — in favour of Mabunda and to the severe detriment of PRASA (and in disregard of the arbitration process underway before Justice FDJ Brand) — would in our view deprive PRASA of significant resources urgently required to address the crisis commuters face daily and is simply irrational.

66 In our court papers we contend that the resolutions taken by the BoC are unlawful for the reason that they were taken by an ‘interim’ BoC that was unlawfully appointed and is improperly constituted; and further on the grounds that the resolutions themselves are irrational and accordingly unlawful because their impact would be to bury all corruption investigations, litigation and asset

protection. This would—indeed appears designed to—benefit entities such as Siyaya DB Consulting Engineers (Pty) Ltd and Siyaya Rail Solution (Pty) Ltd owned by Mr. Makhensa Mabunda.

67 In recent weeks it has become common knowledge that Vossloh España (named changed to Stadler Rail Valencia in 2016 and now owned by the Swiss-owned Stadler Rail AG) the supplier of the too-tall locomotives to PRASA, made a series of payments between February 2014 and October 2015 totalling R75m as a kickback to Mabunda's S-Investments.

68 Swifambo Rail Leasing was the company Mabunda set up to purchase the locomotives from Vossloh España for PRASA. Swifambo was set up only a year before PRASA first advertised the tender and had no track record in the rail industry. It nevertheless won the R3.5bn tender.

69 It is important to remember that Dr Popo Molefe stated on affidavit in 2016 that Vossloh España paid roughly R80m to an Angolan businesswoman, Maria Gomes, a friend of President Jacob Zuma, and to a local lawyer who'd introduced himself to Swifambo's managing director as a fundraiser for the ANC. This was allegedly done because Gomes had insisted that ten percent of the tender's value be paid to the ANC.

69.1 Lucky Montana's testimony to the Eskom inquiry has brought up this payment. He claimed it was initially demanded of him by Dr. Zweli Mkhize, the former Treasurer of the ANC, that 10% of R465 million of the first payment that was due to Swifambo Rail Leasing be paid to him. Montana denies the payment was made and claims he met with Gomes who denied it as well.

69.2 There can be little doubt that Montana's partial truths revealed to the Eskom Inquiry is not whistle-blowing but in fact an attempt to cover-up that the criminal syndicate in PRASA is almost intact and that under his leadership and that of current Deputy Finance Minister Sifiso Buthelezi, they fiercely resisted a takeover by the Gupta syndicate.

#UNITEBEHIND'S ATTEMPTS TO-DATE TO HAVE THE PROBLEMS ADDRESSED

70 We make this submission to Parliament after having made numerous attempts to raise our concerns at all the appropriate levels:

70.1 We have undertaken serious research and education into PRASA state capture (assisted by

whistle-blowers);

- 70.2 We have educated ourselves and the need for a decent rail service.
- 70.3 We have produced two podcasts that address state capture and its role in the increasingly unreliable, unsafe and undignified commuter rail service;
- 70.4 We have created a pamphlet on the crisis (see Annexure 13);
- 70.5 We hold monthly public meetings with activists from our affiliate organisations, engage regularly with commuter groups on social media platforms and have hosted workshops;

71 We organised protests:

- 71.1.1 On the 1st of November we occupied the NPA demanding the immediate arrest of President Zuma after the SCA reinstatement of corruption charges and the revealing of his corrupt relationship with Roy Moodley. Eight of our activists were arrested and held overnight, however all charges were eventually dropped. This followed unsuccessful engagement with Shaun Abrahams, the National Director of Public Prosecutions by the UDF Veterans for more than two months;
- 71.1.2 We have picketed outside of the Portfolio Committee on Transport;
- 71.1.3 On the 30th of November 2017 we organised “The People’s Trial of Jacob Zuma and his PRASA Thieves” where we presented excerpts of evidence to over 2000 people at Cape Town Station.

71.2 We have sent letters to the following people:

- 71.2.1 The Minister of Transport Mr. Joseph Maswanganyi (cc. Chairpersons of the Portfolio Committee on Transport and Standing Committee on Public Accounts) re. the Governance and Operational Emergency in Prasa/Metrail – 18 October 2017 (see Annexure 3).
- 71.2.2 The Chairperson of the Standing Committee on Finance Mr Yunus Carrim re. the

Governance and Operational Emergency in Prasa/Metrorail – 8 December 2017
(see Annexure 14).

71.2.3 The Public Protector Advocate Busisiwe Mkhwebane re. Urgent request for release of a report in the alleged maladministration, mismanagement and abuse of resources and irregular recruitment and labour processes by officials of Metrorail Western Cape most notably Mr. Mthura Swartz – 30 January 2018 (see Annexure 15).

71.3 Letter of demand by our attorneys Bradley Conradie and Halton Cheadle to:

71.3.1 The Minister of Transport Mr Joseph Maswanganyi re. the appointment of the interim BoC and the appointment of Cromet Molepo (see Annexure 16).

71.3.2 To the Chairperson of the interim BoC Justice Makhubele re. the BoC's resolution (see paragraph 59; Annexure 17).

71.3.3 To the National Director of Public Prosecution Mr Shaun Abrahams re. appointing a special investigator and on the protection of PRASA assets – 25 January 2018 (see Annexure 18).

71.4 On 7 August 2017, the UDF Veterans group presented the NPA with a petition demanding that the NDPP urgently proceed with the prosecution of those involved in bribery, corruption and other related criminal activities in various institutions, which included PRASA. The NDPP, Shaun Abrahams, responded that the responsibility for investigating crime lies with police and the Hawks. However, section 22 of the Prevention and Combatting of Corrupt Activities Act 2004 empowers the NDPP to appoint a Special Director of Public Prosecutions to investigate, whenever the NDPP has reason to believe that there may be in any building or in the possession or custody or control of any person any property which may have been used, or is connected with the commission of an offence listed under Chapter 2 of the Act, or may be the proceeds of such an offence. Our attorneys wrote to NDPP Shaun Abrahams to explain this elementary legal point and to request that he exercise his powers accordingly (see Annexure 18). In that letter our attorneys named individuals that we believe, based on the evidence in reports by the Auditor General and Public Protector as well as the Swifambo judgment and other affidavits, have committed offences in terms of Chapter 2 of the Act, namely Mr Makhensa

Mabunda, Mr Mario Ferreira, Mr Roy Moodley, Mr Lucky Montana and Mr Sifiso Buthelezi, to name a few. We have advised the NDPP that should he not respond affirmatively we will be left with no choice but to bring an urgent application to compel him to do so. To date we have received no further response from the NDPP.

- 71.5 On 18 December 2017 #Unite Behind and one of its affiliate organisations Equal Education launched legal proceedings against the Minister of Transport, the NPA and PRASA (regrettably, including Justice Makhubele in her capacity as Interim Board Chairperson of PRASA) and others (Case No. 23200/2017) in the Western Cape Division of the High Court. On 22 December 2017, Justice Siraj Desai postponed the hearing to 19 February 2018, which is less than two weeks away (see Annexure 19).

CONCLUSION

- 72 Thank you for giving this important issue your attention. It literally affects the daily lives of millions of people. These are poor and working-class people that the Constitution insists must be the state's first priority.
- 73 We intend to make this letter public one week from today, not in order to embarrass you but because we believe that in order to take the necessary action you will need public support.
- 74 We hope you have a fruitful year and trust that this letter is received in the spirit of demonstrating our commitment towards building an equal and free society under the rule of law.

Yours Faithfully,

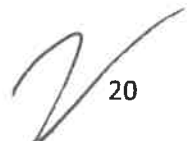
Members of the #UniteBehind Organising Secretariat



Zackie Achmat

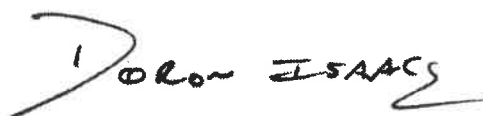


Zukiswa Vuka





Zelda Holtzman



Doron Isaacs



Madoda Cuphe



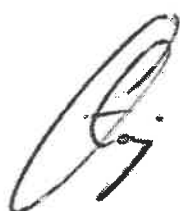
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Noncedo Madubedube



Bruce Baigrie



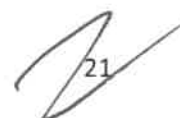
Reverend Alan Storey



Phumeza Mlungwana



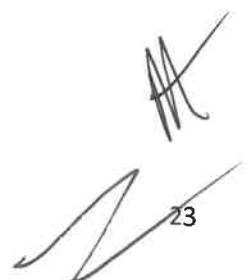
Barry James Mitchell



LIST OF ANNEXURES:

1. Settlement Agreement between the Rail Commuter Action Group and 54 Others v Transnet Limited t/a Metrorail and 3 others [8232/2005] – 12 June 2009;
2. Letter from PRASA's Mr Ernest Hendricks, Regional Security Manager, to Mr Tiro Holele and PRASA's Corporate Office – 31 May 2017;
3. Letter from #UniteBehind to Minister of Transport Joe Maswanganyi re. the Governance and Operational Emergency at PRASA – 18 October 2017;
4. Project Business Plan: Project entered into by and between: Transport for Cape Town (TCT) and the Passenger Rail Agency of South Africa – 22 January 2018;
5. Letter from #UniteBehind demanding among other things an urgent safety and security plan to PRASA Western Cape's Regional Manager, Richard Walker - on 12 January 2018;
6. Rail Safety Regulator, *State of Safety Report 2016/2017*, pp 98 – November 2017;
7. #UniteBehind, *Rig, Conceal, Destroy and Falsify: How State Capture Happened at PRASA*, #PRASALeaks – January 2018;
8. Application for leave to appeal in the matter between Passenger Rail Agency of South Africa v Siyangena Technologies (PTY) LTD and 2 others [2016/7839] – 21 August 2017;
9. Letter from ranking member of the Judiciary to #UniteBehind re. Justice Makhubele – 29 January 2018;
10. Letter from #UniteBehind to Justice Makhubele re. the appointment of Mthura Swartz – 5 January 2018;
11. Progress Report: Alleged maladministration and mismanagement and abuse of resources and irregular recruitment and labour processes by officials of Metrorail Western Cape [001076/13/WC], Office of the Public Protector – 17 November 2015;
12. Memorandum to the Chairperson of the Board of Control of PRASA from Group Executive: Legal, Risk and Compliance – 5 December 2017;
13. #UniteBehind pamphlet for the #FixOurTrains campaign – 31 October 2017;
14. Letter from #UniteBehind to Chairperson of the Standing Committee on Finance Yunus Carrim – 8 December 2017;
15. Letter from #UniteBehind to Office of the Public Protector re. the release of final report (see Annexure 10) – 30 January 2018;
16. Letter of demand from #UniteBehind attorneys to the Minister of Transport Joe Maswanganyi re. the appointment of the interim BoC and the appointment of Cromet Molepo – 8 December 2017;
17. Letter of demand from #UniteBehind attorneys to the Chairperson of the interim BoC Justice Makhubele re. the BoC's resolution – 8 December 2017;
18. Letter of demand from #UniteBehind attorneys to National Director of Public Prosecutions re. investigation and protection of PRASA property – 25 January 2018;

19. Notice of Motion and Founding Affidavit in the matter between #UniteBehind and Equal Education v the Minister of Transport and the Passenger Rail Agency of South Africa [23200/2017] – 18 December 2017.



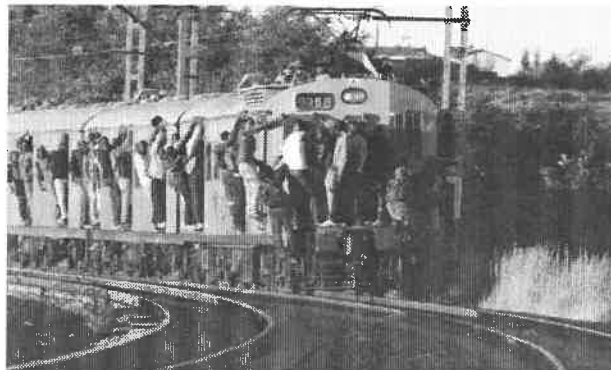
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#PRASALEAKS

Rig, Conceal, Destroy and Falsify: How State Capture Happened at PRASA.

R2.5 Billion Irregular Expenditure

#UniteBehind Report for the Standing Committee on Public Accounts and the Portfolio Committee on Finance on leaked forensic investigations by Treasury of about 200 contracts worth approximately R15 billion at the Passenger Rail Agency of South Africa (PRASA)



Compiled by the #UniteBehind Metrorail Monitoring Project: December 2017

#UniteBehind is a coalition of people's movements and their support organisations. We are supported by trade unions, faith-based organisations, community groups, women's organisations and individuals.

#UniteBehind works for a just and equal South Africa where all people share in the country's wealth and participate in the decisions that affect their lives, and where the environment is sustainably protected for future generations.



1. Introduction

Corruption and state capture compromises the provision of social goods and basic public services, directly devastating the lives of people, especially the working-class and poor. This includes unnecessary increases in the costs of electricity, water, and transportation. In the case of the Passenger Rail Agency of South Africa (PRASA), state capture and corruption directly disrupt and harm the lives and livelihoods of people every day.

This year close to 500 passengers have died and over 2000 have been injured according to the Railway Safety Regulator¹. Beyond this terrible cost of lives, such accidents and crime costs railway operators almost a billion rand (R961 million)². Almost all passengers routinely suffer physical and psychological harm. It is estimated that 43% of former passengers (~248 500) have stopped using Metrorail in the Western Cape over the past four years³. On average over 73% of trains are late and around 7% of all trains are cancelled. However, up to 57% of trains have been cancelled during certain weeks on the Central Line, with an overall 400% increase in train cancellations in the Western Cape between 2015 and 2017⁴.

The most extreme example of this took place in the week of Monday 11th December 2017, when Metrorail issued a statement that all services on the Cape Town Central Line would be suspended until further notice. They blamed this on extreme vandalism. The full service was still not fully restored three days later. This line services commuters from Langa, Bonteheuwel and Gugulethu through to Mitchell's Plain and Khayelitsha.⁵

The crisis means that passengers are consistently missing work and losing their pay and leave. Such passengers often lose their jobs as well. Consequently, commuters are desperate to get onto trains and this is regularly responsible for the deaths and injuries mentioned above. It leads people to run across the tracks, hang out of doors and windows, travel between carriages, or ride on the roofs of overcrowded and shortened trains. If passengers do make it to work on time, they will probably get home late, leaving them with less time for their families, let alone for themselves. Such a lifestyle is prone to anxiety, stress and depression. Individual households can suffer catastrophic consequences and the local economy suffers greatly, while corrupt actors at PRASA, the companies that captured them, and our public representatives revel in luxury, with no fear of prosecution or consequences.

¹ Railway Safety Regulator. *State of Safety Report 2016-2017*. Available: [<http://www.rsr.org.za/infocenter/knowledgehub>]

² Bratton, L. Railway's R1 billion accident and crime bill. (GroundUp, 2017). Available: [<https://www.groundup.org.za/article/sa-railways-r1-billion-accident-and-crime-bill/>]

³ TDA Cape Town. *Comprehensive Integrated Transport Plan 2017 – 2022*. (Report by City of Cape Town Transport and Urban Development Authority - 2017), pg. 41.

⁴ Nceba Hinana, *A 400% increase in train cancellations worries the Western Cape*. (Business Day, 2017). Available: [<https://www.businesslive.co.za/bd/national/2017-08-15-a-400-increase-in-train-cancellations-worries-the-western-cape/>]

⁵ Chabala, J. *Metrorail suspends all train services on Cape Town central line*. (News24, 11-12-2017; 10:18) Available: [<https://www.news24.com/SouthAfrica/News/metrorail-suspends-all-train-services-on-cape-town-central-line-20171211>]

#PRASALeaks – Treasury Forensic Investigation

In 2012, the South African Transport and Allied Workers Union (SATAWU) laid 37 complaints with the Public Protector. These implicated Lucky Montana the then PRASA General Chief Executive Officer (GCEO) and other functionaries at PRASA. The complaints alleged maladministration and related improper conduct involving procurement irregularities, conflicts of interest, nepotism and human resources mismanagement, including victimization of whistleblowers. When SATAWU tried to withdraw its complaint, the National Transport Movement pursued the complaint.

On 24 August 2015, Advocate Thulisile Madonsela released “*Derailed: A report on an investigation into allegations of maladministration, financial mismanagement, tender irregularities and appointment irregularities against the Passenger Rail Agency of South Africa (PRASA)*”. The Public Protector found evidence of systemic maladministration at nearly all levels of PRASA’s financial management, tendering and appointment processes.

One of the most important remedial actions prescribed by Advocate Madonsela required the Chairman of the PRASA Board 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.”⁶ One of the reasons this finding was made was because she could not get access to documents relating to procurement:

“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 dribs 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.”⁷...

“I must also indicate that the authenticity 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 as evidence, principally relating to procurement is doubtful.”⁸

In February 2016, the National Treasury, in compliance with the Public Protector’s directions, commissioned forensic investigations into 216 contracts awarded by PRASA between 2012 and 2015. Of these, only 13 were found to have been above-board.⁹

⁶ Public Protector South Africa, *Derailed* (2015), Sec: 33, (b), 5, p. 49

⁷ Public Protector South Africa, *Derailed* (2015), (xviii), p. 20

⁸ Public Protector South Africa, *Derailed* (2015), (xix), p. 21

⁹ Pauli van Wyk. *Scorpio: Prasa – Treasury investigation recommends Sifiso Buthelezi be criminally charged*. (Daily Maverick, 2017). Available: [<https://www.dailymaverick.co.za/article/2017-06-10-scorpio-prasa-treasury-investigation-recommends-sifiso-buthlezi-be-criminally-charged/#.WjFd2N-WhIU>]]

During most of the period covered by the Treasury Investigations, PRASA was led by the then Board Chairperson, Mr. Sifiso Buthelezi (now Deputy Minister of Finance) and Mr. Lucky Montana, GCEO. A mostly new Board under the leadership of Mr. Popo Molefe was appointed in August 2014 when it became clear that PRASA's main subsidiary, Metrorail, which transports more than 1 million people daily, was in crisis. The new Board worked with Treasury under former Minister of Finance Pravin Gordhan, former Director-General of Treasury Mr. Lesetja Kganyago and the former Chief Procurement Officer of Treasury Mr. Kenneth Brown to implement the findings of the Public Protector. PRASA's reconstituted Board under Molefe also implemented other findings of the Public Protector while the Treasury Investigations into the 216 contracts over R10 million continued. Wherever they found corruption, they tried to act swiftly.

The subsequent dismissal of successive Ministers of Finance (Nhlanhla Nene and Pravin Gordhan) and of Mcebisi Jonas (Deputy Finance Minister), as well as the departures of key Treasury staff, is the direct result of efforts to protect the interests of those involved in state capture and systemic corruption. A great deal of evidence and analysis has proven the command, capture and control of government departments and state-owned entities by private interests, including the Gupta and Zuma clans as well as their networks. State capture has become synonymous with the Guptas. This is true but not the whole story.

On the 14th of November 2017, the Parliamentary Portfolio Committee on Transport suddenly called a hearing to discuss corruption at PRASA to follow-up on the former Public Protector's Derailed Report.¹⁰ #UniteBehind activists and commuters attended the hearing where it became clear that the Transport Minister Joe Maswanganyi, egged on by the Committee Chairperson Dikeledi Magadzi, wanted to focus on investigators hired by former Board chairperson Popo Molefe, rather than on Sifiso Buthelezi, the billions lost to corruption and the criminal enterprise that had captured PRASA. Unlike the credible inquiry into State Capture at Eskom by the Portfolio Committee on Public Enterprises, the Transport Committee appeared to start a white-washing process that would target those wanting to expose the corruption and weaken or conceal the findings of the Treasury Investigations.

In response to this threat to bury the investigation, whistleblowers provided #UniteBehind with the documentation, in the belief that our work against state capture in PRASA/Metrorail demonstrated that the coalition could be trusted with the findings of the Treasury Investigations. The #PRASALeaks expose a staggering level of corruption and non-compliance with the constitutional and legal obligations of the rail transport agency.

#PRASALeaks indicates that Jacob Zuma may have other criminal enterprises involved in state capture. Makhensa Mabunda, Roy Moodley and Mario Ferreira, among others, may be implicated in capturing PRASA. They parallel the Gupta's modus operandi acting with the protection of Zuma, Buthelezi and Montana. The Treasury Investigations threatened to expose the capture of PRASA/Metrorail. Those implicated fought back by forcing out Popo Molefe, the then PRASA Board Chairperson, and those helping him to fix the problems at PRASA, shutting down all forensic investigations including that of Treasury. The complete findings of the Treasury Investigations have not yet seen the light of day, until now.

¹⁰Minister of Transport on PRASA state capture allegations; SAMSA & ATNS audit challenges. (Parliamentary Monitoring Group, 2017). Available: [<https://pmg.org.za/committee-meeting/25489/>]

#UniteBehind received about 1500 pages in reports based on forensic investigations by about 13 forensic and legal entities. We believe that this information must be made public because the impact of state capture at PRASA has led to the virtual collapse of the passenger rail network, including the obliteration of professional capacity and the drastic breakdown in infrastructure and rolling-stock at Metrorail. The impact on passengers is devastating.

These documents are of vital public interest. We have therefore released the documents to the community news site, GroundUp, to assist with investigation and dissemination. We chose GroundUp as they have consistently held Metrorail accountable for its failures to people who suffer (not use) trains every day.

This Interim Report highlights evidence which points to a level of criminal collusion and widespread breakdown in professional ethical conduct on the part of the then Board, PRASA senior management, officials and suppliers. Under Popo Molefe's short-lived leadership, PRASA laid about 40 charges with the Directorate of Priority Crimes Investigation (DPCI or Hawks) and the National Prosecution Authority more than two years ago.

At present, the criminal justice agencies such as the Hawks and the National Prosecuting Authority are engaged in obstructing investigations and prosecutions. For this reason, #UniteBehind appeals to academics, journalists, researchers and activists to expose the criminal enterprise that captured PRASA and demand and take action in the public interest.

While the majority of cases investigated by the Treasury have yet to result in legal action, the PRASA Board under Popo Molefe took the two biggest cases to court in order to declare the contracts worth about R7 billion unlawful. The courts have pronounced on these major cases involving Siyangena Technologies and Swifambo Rail Agency. In the case of Siyangena, the court declined to hear the matter because it was out of time. PRASA has appealed the case. In the case of Swifambo, the tender process was found to be rigged to provide a European company, Vosloh Espana, the contract to provide PRASA with locomotives. Swifambo has appealed this outcome.

On 3 July 2017, High Court Justice Francis said the following in *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd*:

"This case raises issues of fundamental public importance. This case concerns corruption by a public body concerning a tender that will affect the public for decades to come. This case is not merely a case about the public purse being used to acquire assets that will be used by the state or public officials. The public will make use of these locomotives for a considerable period of time and be directly affected by the benefits of harm arising from the decision to acquire them from Swifambo. ...

Harm has been done in this case to the principle that corruption should not be allowed to triumph. Harm will be done to the laudable objectives of our hard fought freedom if I was not to set aside the award. Harm will be done to all the hardworking and honest people of our land who refrains from staining themselves

with corruption. Harm will be done were I to allow an unlawful tender to remain intact. Harm will be done to the whistleblowers who were able to blow a whistle to members of the reconstituted board. Harm will be done if the benefactors of the tender were allowed to reap the benefits of their spoils. Harm will be done to the administration of justice if this award is not set aside from the onset. Corruption will triumph if this court does not set aside the tender.”¹¹

Swifambo appealed this judgment and the Supreme Court of Appeal is expected to hear this matter next year¹². The courts have often come to the rescue but it is the decent women and men in PRASA, Treasury, Transnet and the public service generally who resist state capture by being professional and hard-working. This report has been made possible by working people who fear for their livelihoods and often for their lives when they refuse to turn a blind-eye to corruption. They choose instead to defend an ethical public service that places the needs of Metrorail passengers first. We are indebted to these public servants.

2. PRASA Governing Framework

“One of the cornerstones of democracy is that government leaders should be held accountable for how they use their power, including how they manage public funds. Through organizations and elected representatives, the public has a duty and a right to monitor government performance and draw attention to broken promises and mismanaged public resources.”¹³

2.1 Constitutional Obligations of PRASA

The Minister and Department of Transport, the PRASA Board, management and staff have a constitutional duty to put the needs of passengers first. The Constitution of South Africa is the cornerstone of the legal, regulatory framework within which PRASA must function. In terms of the injunctions of the Constitution, PRASA:

- Has a duty to promote and maintain high standards of professional ethics;
- Has a duty to make efficient and effective use of resources;
- Is required to be transparent, accountable and encourage public participation in policy making;
- Should be development oriented and provide fair, equitable, unbiased services that are responsive to community needs;
- Should procure goods and services in a manner which is *fair, equitable, transparent, competitive and cost-effective, protecting or advancing people* or categories of people who are disadvantaged by unfair discrimination.¹⁴

¹¹ The High court of South Africa Gauteng Local Division, *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* (2015/42219) [2017] ZAGPJHC 177; [2017] 3 All SA 971 (GJ); 2017 (6) SA 223 (GJ) (3 July 2017). Available: [<http://www1.saflii.org/cpi-bin/dispatch.pl?file=za/cases/ZAGPJHC/2017/177.html&query=Swifambo>]

¹² Engineering News, *Swifambo welcomes granting of leave to appeal on contract with PRASA*, (2017). Available: [http://www.engineeringnews.co.za/article/swifambo-welcomes-granting-of-leave-to-appeal-on-contract-with-PRASA-2017-09-04/rep_id:4136]

¹³ van der Westhuizen, Carlene; *Monitoring Public Procurement in South Africa: A Reference Guide for Civil Society Organisations*; (2015). Available: [<https://www.internationalbudget.org/publications/monitoring-public-procurement-south-africa-guide/>]

¹⁴ Constitution of the Republic of South Africa, 1996

2.2 Legislative Obligations

Various laws, regulations and policies apply to the governance of PRASA. By law, PRASA must provide a passenger rail service that is safe, reliable, affordable, accessible and of an acceptable standard. The Minister of Transport must ensure that PRASA has sufficient funds, infrastructure and rolling stock to give effect to this obligation¹⁵. Financial management, procurement and asset protection are the responsibility of the PRASA Board and Executive Management.^{16 17}

Over the last ten years, PRASA failed to fulfill almost every one of its constitutional and legal mandates as state capture and corruption appears to have become the norm. The #PRASALeaks provides damning evidence of the scale and institutionalisation of the corruption.



3. Summary of Findings

The National Treasury commissioned forensic investigations into all contracts PRASA had entered into after 2012 with a value in excess of R10 million, in compliance with the remedial action contained in *Derailed* (2015), the then Public Protector Advocate Thuli Madonsela's report on the passenger rail service.

¹⁵ National Land Transport Act, 5 of 2009;

¹⁶ In addition, the following Acts and Policy apply: Legal Succession to the South African Transport Services Act 9 of 1989; Legal Succession to the South African Transport Services Amendment Act, No. 38 of 2008; Public Finance Management Act, 9 of 1999; Preferential Procurement Policy Framework Act 5 of 2000; Broad-based Black Economic Empowerment Act 53 of 2003; National Treasury guidelines and regulations; Construction Industry Development Board Act, 38 of 2000

¹⁷ PRASA Supply Chain Management Policy September 2014

National Treasury contracted 13 forensic and legal firms to carry out the investigations: Bowmans, Deloitte, ENS, Fundudzi, Gobodo, JGL, KPMG, Nexus, PPM, Strategic Investigations and Seminars, PWC, Sekela Xabiso and TGR.

Although the reports do not constitute fully fledged forensic audits, they make damning findings and, where they had access to sufficient information, make firm recommendations based on the information, documentation and data made available to them by PRASA and the suppliers. The Treasury Investigations represent what auditors call “the smell test”, an inquiry into all available paperwork for procurement and contract management supplemented by interviews with relevant management officials, staff and suppliers. In virtually every case, the investigator did not have access to the full set of documentation and were therefore unable to verify whether critical steps had been carried out according to Policy or whether they had been carried out at all. In most cases investigators were unable to undertake site visits to verify whether work was actually done, often because the lapse of time would not make this meaningful.

Despite these cautions, the forensic reports point to gross corruption which goes well beyond the bounds of financial mismanagement and maladministration, too often identified by Parliamentary oversight bodies and the Auditor-General with respect to government departments and other State entities.

Our review of the vast majority of the reports of the investigators reveals dangerous trends and findings. The Treasury Investigations reveal the following:

- The extensive, institutionalised corruption at PRASA/Metrorail directly implicates Deputy Finance Minister Sifiso Buthelezi, in his then capacity as chair of the PRASA Board and members of the Board in criminal collusion and negligence.
- There is evidence that President Jacob Zuma’s network of friends and associates including Makhensa Mabunda, Roy Moodley, Mario Ferreira, Arthur Fraser, Manala Manzini, Auswell Mashaba and others unduly benefited through their companies from contracts which were irregularly obtained or for which little or no documentation exists that can prove legality.
- The Ministers of Transport at the relevant times: Ben Martins, Dipuo Peters and now Joe Maswanganyi appear to have deliberately turned a blind eye to corruption and mismanagement. In the case of Peters and Maswanganyi, there appears to be collusion to obstruct justice.
- The investigation points to Lucky Montana (GCEO), Josephat Phungula, Chris Mbatha, Daniel Mthimkulu, Rebecca Setino, Maishe Bopape and Ernest Gow as key members of the network in PRASA that appear to have facilitated the capture of the institution for the benefit of the President’s Keepers.
- The companies that are directly implicated include the “S Group” which includes Siyaya Energy, Siyaya DB Consulting Engineers and Siyaya Rail Infrastructure Solutions and Technology; Royal Security; Resurgent Risk Management; Tshireletso Enza Construction.

- R15 billion was the total value of the contracts investigated by Treasury and R6 billion of this amount constitutes questionable expenditure. Specifically, R2.5 billion can explicitly be attributed to “irregular” and unlawful expenditure or due to irregular appointments, while a further R3.5 billion is unverifiable, due to lack of documentation.
- All the investigators found that there was an absence of record keeping and/or documentation. Information, documents and data were either missing altogether, misplaced, possibly destroyed or not made available to the auditors. In many instances, where documents were found, they revealed that the process did not comply with PRASA’s Supply Chain Management policy. Irregular documentation, in turn, renders expenditure to be irregular. The problem of irregular or non-existent record keeping spanned the entire supply chain process. Given how widespread the lack of documentation and/or record keeping is, it is reasonable to make an assumption that this is not simply a case of poor or incompetent record keeping but rather a deliberate act to facilitate corruption, where processes were either not followed at all or failed to follow the prescribed processes. Without an audit trail, it is not possible to verify whether critical steps in the procurement process were in fact followed. Without an audit trail there is the ability to syphon public funds and resources with impunity.
- One of the consistent gaps across all investigation reports is the lack of any information on needs analysis for individual tenders. This created serious risk of non-delivery and shoddy work. The lack of a proper needs analysis laid the foundation for tender evaluations which were not based on providing the best possible outcome for PRASA, but rather on ensuring a preferred provider was successful. Deviation from laid down professional standards were recorded in a number of the investigations, where there were specific lowering of the legislated standards applicable to projects, depending on the value of the work.
- Tender or contract rigging was commonplace. Procurement processes routinely defied the requirements of both PRASA’s own Supply Chain Management policies as well as the Public Finance Management Act and other legislation. Astonishingly, PRASA only established a Bid Specification Committee in 2015. The failure to undertake proper demand management undermined virtually every tender under investigation, ensuring that bids could not be properly assessed, scoring would not result in the best supplier being selected, pricing could not be easily judged, contracts were inadequate and payments could be made which were unrelated to actual delivery against an objective specification. This failure was too widespread to be considered a reflection of inadequate technical expertise. It was more likely to be a deliberate attempt to manipulate the tender process, to allow preferred corrupt suppliers to be appointed.
- Where competitive tendering processes were followed on the surface, the scoring of tenders was manipulated to allow suppliers without the required technical or financial capability to win bids. A significant number of contracts were awarded through non-competitive processes, in direct breach of policy and legislation.

- The investigation reports do not say much about contract management, but where there was the capacity to investigate, there was evidence of serious non-delivery on contracts, despite the supplier being paid in full for the services. There was also evidence of price inflation and overcharging.
- There is a shocking absence of accountability throughout PRASA, from the Board, through to senior management, as well as the Finance, Supply Chain and Internal Audit Departments. Some staff members were disciplined and others dismissed but the leaders of the criminal enterprise remain unscathed.
- The Auditor-General failed to detect the systemic corruption and state capture for several years.
- The Parliamentary Portfolio Committee on Transport continues to fail in its oversight of PRASA duties by ignoring clear evidence of state capture and systemic corruption.
- Most seriously, despite mountains of evidence of systemic corruption and state capture at PRASA, the Directorate for Priority Crimes Investigation (the Hawks) and the National Prosecuting Authority have failed to act for more than two years.

4. Case Studies: The Mechanisms of Corruption and Maladministration

Case Study 1: ENZA Construction¹⁸

ENZA Construction has been awarded over R310 million for three PRASA contracts over the period that was reviewed; in each case there were a variety of irregularities involved. With regards to the first of these contracts, PRASA published an invitation to tender for the restoration and upgrade of facilities at Saulsville Station, in Tshwane. This was published on 23 November 2013. Due to the fact that this construction was estimated to cost R70 million, a Bid Evaluation Committee (BEC) and a Corporate Tender and Procurement Committee (CTPC) would be a legal requirement. These committees would be responsible for adjudicating the awarding of the contract. At the outset of this tender process the forensic reviewers noted that the BEC was not properly constituted and there was no evidence that a CTPC was ever constituted. The auditors note that it was Chief Procurement Officer, Josephat Phungula, who irregularly recommended ENZA Construction to the then GCEO Lucky Montana and ENZA was subsequently appointed on the 19th of June 2014. No proper procurement procedures were followed and as of May 2016 a total of R26,749,481.04 had been paid to the company.

¹⁸ Gobodo Forensic and Investigative Accounting (Pty) Ltd. *Appointment of Enza Construction (Pty) Ltd – Saulsville Station ; Appointment of Enza Construction (Pty) Ltd – Upgrade of warehouse facilities at Durban Station* (Forensic investigation into various PRASA contracts. Consolidated summary findings of final reports, 2016) Available: [\[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/5.%20Gobodo/Consolidated%20summary%20report%20-%2031%20October%202016_eob.pdf\]](https://www.groundup.org.za/media/uploads/documents/PRASALeaks/5.%20Gobodo/Consolidated%20summary%20report%20-%2031%20October%202016_eob.pdf)

In the second contract that was awarded to this company, ENZA was appointed as the main contractor to redevelop Mabopane Station. The total contract value was R146,6 million. There is no evidence to suggest that any official procedures were followed in the awarding of the contract – tender documents, appointments of the BEC and CTPC, and minutes of meetings are all absent. As of September 2016 the company has received R121.8 million from PRASA on this contract alone.

In the third and final contract, PRASA published a tender for the upgrading of warehouse facilities at Durban Station at a limit of R100 million. In this case, documentation shows that the BEC did meet and reviewed 9 tender submissions that were received. However, there is no evidence that a CTPC was constituted, which is required for tenders of this size. In fact, instead of a recommendation coming from the CTPC, it was a recommendation letter from Josephat Phungula to the GCEO, Mr. Montana, that endorsed ENZA Construction for the contract at an amount of R97,841,346.33. As the CPO, Mr. Phungula had no authority to sign or issue a recommendation report. ENZA was paid R95,739,070.39 for the work.

Case Study 2: Siyaya Energy¹⁹ and Valucorp²⁰

Siyaya Energy, under the Siyaya Group or 'S Group', had initially been appointed by PRASA for the provision of fuel tanks, bulk fuel services and e-tags. At the same time they had been appointed by PRASA for the investigation and prevention of fuel fraud. At the start of this contract, this was shockingly not deemed to be problematic or a conflict of interest. Irregularities around this appointment and contract management will be discussed below.

On 03 December 2010, a company by the name of Valucorp CC [which also goes by 'S Dayanand Forensic Consulting' (SDFC)] was registered as an entity. The Active Principal, Sudesh Dayanand was appointed on the same date. Siyaya Energy subcontracted their duties of investigation and prevention of fuel fraud to this company, SDFC. From interviews conducted around these contracts, it is suggested that SDFC was subcontracted by Siyaya Energy within weeks to months of them being registered as an entity.

From the available evidence, the Siyaya Group received a total of seven contracts during the period analysed. The sole director of the Siyaya Group is Mr. Makhensa Mabunda²¹. Siyaya Energy received one contract for R855,738,021.00²². Siyaya DB Consulting Engineers (Pty) Ltd received five contracts for a total of R214,909,023.19²³ and Siyaya Rail Infrastructure received one for R69,985,033.00²⁴. For all seven

¹⁹ ENS Forensics (ENS), *EXECUTIVE SUMMARY OF SIYAYA ENERGY CONTRACTS*. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/3.%20ENS-ENS%20FORENSICS%20-%20EXECUTIVE%20SUMMARY%20OF%20PRASA%20INVESTIGATION.pdf>]

²⁰ PricewaterhouseCoopers (PWC), *The appointment of Valucorp, (REPORT: FORENSIC INVESTIGATION INTO THE PROCUREMENT OF TWENTY (20) PROJECTS AWARDED BY THE PASSENGER RAILWAY AGENCY OF SOUTH AFRICA (PRASA), 2016*. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/11.%20PWC/Final%20Report%20National%20Treasury%20PRASA%20projects%2028%20Oct%202016.pdf>]

²¹ Van wyk, P. *PRASA accuses SA 'partner' of fraud* (Mail and Guardian, 2016). Available: [<https://mg.co.za/article/2016-06-24-00-PRASA-accuses-sa-partner-of-fraud>]

²² ENS, *Section 1.3.4.1*.

²³ ENS, *Section 2*.

²⁴ TGR Attorneys (TGR), *Siyaya Rail Infrastructure Solutions and Technology (Pty) Ltd, (INVESTIGATION INTO CERTAIN SUPPLY CHAIN MANAGEMENT AND CONTRACT AWARD IRREGULATIES BY THE PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA), 2017*, Section 4.2. Available:

[<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/13.%20TGR/NT-%20PRASA%20Report.pdf>]

contracts, the total value contracted is more than R1,2 billion. Every single one of these contracts have features that are irregular. For example, findings relating to the single contract to Siyaya Energy, described above for bulk fuel services and prevention of fuel fraud, for a value of more than R855 million are as follows:

- PRASA did not conduct any due diligence or needs analysis before it advertised the tender that was given.
- Siyaya Energy had not actually attended the compulsory briefing session regarding the tender but was still ultimately awarded the contract.
- The Notice of Appointment regarding a three-year extension of this contract, issued by Mr. Josephat Phungula, occurred on 06 June 2014, while PRASA's board only approved the extension some eight weeks later, on 31 July 2014.
- It appears that PRASA's board approved the extension of this contract even though no procurement process was followed.
- Upon requesting that PRASA provide documentation on payments made to Siyaya Energy, only an extract of these could be accounted for, and therefore the total value paid to them for this contract could not be established whatsoever. The value paid to them could be higher or lower than R855 million.

SDFC's subcontracted investigation into fuel fraud yielded more than 9000 irregular fuel transactions at 45 petrol stations within eight months²⁵. These amounted to a total value of over R20 million, which is equivalent to approximately 15% of the total fuel costs of PRASA. Siyaya Energy was responsible for providing an e-fuel system that monitored and accounted for this fraud but irregularities relating to their e-fuel system were identified. A conflict of interest was therefore noted.

Due to this conflict of interest, PRASA moved to appoint SDFC directly. Their appointment was based on confinement, a non-competitive process that is usually only indicated in very specific and recognised circumstances, arguing the fact that Siyaya Energy had chosen to hire them before, for this purpose. The reasons given for confinement are however not valid. There are various forensic investigation companies which could have fulfilled this contract, and any relationship since established between SDFC and Siyaya Energy would not have dissipated purely because of the change in appointment structure. Contracts between SDFC and PRASA, over their total duration, were estimated to be worth over R43 million.

Important findings, in addition to the abovementioned irregularities around the tender procurement processes, regarding the appointment of SDFC and their services provided include: (1) a contract agreement, signed by Mr. Montana on 23 April 2013, does not provide how rates per hour or level of staff used for their services are determined, (1b) does not provide details of the Project Managers on behalf of

²⁵ PWC, Section 8.780. Available:

[<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/11.%20PWC/Final%20Report%20National%20Treasury%20PRASA%20projects%2028%20Oct%202016.pdf>]


PRASA or SDFC and (1c) does not state to whom SDFC should report, (2) payments were not supported by any timesheets and/or supporting documentation as would usually be required for this type of service, and (3) that during forensic investigations (concluded in 2016), no evidence of any forensic reports being issued by SDFC could be found or accounted for, despite the company being paid more than R36 million.

Noting that there were large gaps in documentation around these contracts, interviews with pertinent staff were conducted. While these may be less objective than formal documentation, the findings of these interviews are summarised below and provide important insights. It was noted that SDFC were paid according to a flat rate and the payment schedule was adhered to irrespective of proof that services were provided, or the quality of those services. SDFC was noted, in various interviews, to be reporting directly to Mr. Montana. An office manager noted that he had never been able to see the content of these reports as they were provided directly to Mr. Montana in sealed envelopes. The office manager went on to describe that upon receiving invoices from SDFC, Mr. Montana had always confirmed that he was satisfied with the work performed, where after the invoices were approved for payment. At a time when the contract between SDFC and PRASA was initially coming to an end (in 2013), individuals reported being criticized by Mr. Montana for raising the topic of this contract ending, during Executive Committee meetings. Mr. Montana seemed to be very supportive of this contract continuing and extensions to this contract ultimately led to it running until 2015.

Damning findings, highlighted above, were made by SDFC during their time of being contracted to Siyaya Energy - regarding fuel fraud of at least R20 million. These findings were recognised by PRASA (as confirmed in CTPC meeting minutes from 10 April 2013) but evidence of disciplinary action or criminal charges arising from this investigation are severely lacking. On the contrary, contracts with Siyaya Energy and other companies in the Siyaya Group were renewed after findings made by SDFC. The majority of interviews conducted by forensic investigators gave the impression that nothing had ever transpired out of the work done or the reports written by SDFC. Noting that Mr. Montana was the individual reading and handling these reports, it would seem that he should be able to give further comment regarding subsequent investigations and their findings and recommendations. However, Mr. Montana declined the invitation to any interviews on this topic.

Case Study 3: Fantique Trade 664 CC²⁶

PRASA entered into two contracts with Fantique Trade 664 CC (Fantique) in early 2012. This company has no website and it is unclear which individuals are involved, but they appear to be based in Benoni. Both contracts were to do drainage upgrade works. Forensic investigators who were asked to look into this contract did not receive any documents relating to Fantique's appointments, the method used to appoint Fantique or when the appointment was made. After struggling to obtain these documents and details, the investigators concluded that, *"the documents relating to the appointment of Fantique on both contracts do not exist and/or PRASA does not want to provide these documents and/or that these documents may have*

²⁶ Deloitte, *Findings relating to the appointment of Fantique Trade 664 CC and the payments to this supplier*, (Final report: Forensic investigation into the appointment of and payments made to various service providers of the Passenger Rail Agency of South Africa (PRASA), 2016.), Section 18. Available: [https://www.rrroundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf] 

been destroyed.” In light of these glaring gaps in documentation, the total contract value of R29 million was deemed to be possibly irregular expenditure.

Missing documentation in this case study goes further than the above. The forensic investigators experienced and noted the following in their hunt for documentation: (1) unknown PRASA officials had signed necessary checklists on certain invoices prior to payment, (2) for three payments, totaling R8.2 million, there was no proof that PRASA had completed this necessary checklist or had invoices signed off whatsoever, (3) for five payments, totaling R1.7 million, no supporting documentation could be provided at all, and (4) Fantique could only provide a statement, with amounts, for one payment of R2.8 million. With reference to points (1) and (2), it is important to note that without valid signatures and completed checklists, PRASA ultimately had no proof that the relevant services or goods had actually been provided before they made these payments.

In the view of the investigators, the PRASA Board has contravened the law (Section 50(1)(a) of the PFMA) in that it failed to exercise reasonable care to ensure the proper safekeeping of procurement related documents. Furthermore, in terms of the relevant laws, (Section 83(2) of the PFMA), all of the PRASA board members are individually and severally liable for financial misconduct.

Case Study 4: Marble Arch Cleaning Services²⁷

In 2012, PRASA identified various stations in Gauteng North, Gauteng West and Gauteng East that needed to be cleaned. After issuing a request for proposals, Marble Arch Cleaning Services submitted a tender for the cleaning of stations in Gauteng West on 25 May 2012. Forensic investigators reported that there was no evidence of a tender submitted by this company for Gauteng North or East. Marble Arch Cleaning Services have no website or information available online and therefore we were unable to establish the individuals involved in this company. PRASA issued a Notice to Proceed to Marble Arch on 1 November 2012 at a cost of R802,000.08 per month for the cleaning of stations in Gauteng West, and on the same date a Notice to Proceed at R113,867.91 per month, for Gauteng North. The reason for a Notice to Proceed for Gauteng North, when it doesn't appear that a tender application was submitted, is unclear. The contract period was stipulated at 12 months.

On 25 February, 2013, Marble Arch signed a contract agreement stating they would deliver cleaning services at a cost of R126,881.09 per month for Gauteng West. This value is very different to that in the Notice to Proceed. PRASA never actually signed this contract agreement. The cumulative value of this contract over a period of 12 months would be R1,522,573.08.

²⁷ Deloitte, *Findings relating to the appointment of Marble Arch Cleaning Services and the payments to this supplier*, (Final report: Forensic investigation into the appointment of and payments made to various service providers of the Passenger Rail Agency of South Africa (PRASA), 2016.), Section 11. Available: [\[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf\]](https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf)

Forensic investigators were able to estimate a cumulative value paid to March Arch by PRASA for the period under investigation. This total came to R58,997,221.93. This is more than 35 times the contract value expected by March Arch Cleaning Services. R54,868,144 of this amount was in payments that had no supporting documentation whatsoever and moreover, certain invoices were signed off by unknown PRASA officials. Overall, it is still not clear how many contracts PRASA awarded to Marble Arch due to missing documentation.

The forensic investigators believed that PRASA's Board at the time should be held accountable for financial misconduct in that it may have contravened Section 50(1)(a) of the PFMA in failing to exercise reasonable protection of procurement and financial documents. In terms of section 83(2) of the PFMA, all members of PRASA's board should be held liable. The investigators also recommend that PRASA (in collaboration with the national treasury) consider disciplinary action against PRASA board members at the time for contravening Section 50(1)(a) of the PFMA.

Case Study 5: SA FENCE & GATE (SAFG)²⁸

SA Fence and Gate (SAFG) falls under the SA Security Solutions and Technologies (SASSTEC) group²⁹. Former employees and whistleblowers have already made explosive allegations of corruption against this group in the media³⁰. PRASA's original contract to SAFG was awarded at R209,874,559.79³¹. At the conclusion of forensic investigation into this contract, payments to the value of R295,292,897.77 had been made, despite less than fifty percent of the work being completed. The forensic investigators have deemed that all of these payments should be reported to the National Treasury as irregular expenditure. The evidence behind the conclusions of irregular expenditure comes from the fact that the tender was not properly advertised (as should have been done by the acting Chief Procurement Officer, Chris Mbatha and the Senior Manager for Procurement, Matshidiso Mosholi)³², SA Fence and Gate's B-BBEE certificate could not be verified, and significant other documentation was missing. The correct processes regarding the constitution of the bid evaluation committee (BEC) were not followed.

With regards to specifics of contracts with this company, SAFG had been contracted to do a fencing project at the Wolmerton Depot. Due to various problems with the contract, PRASA had to accelerate its completion at a cost of R8,909,342 which could have easily been avoided, as explained below. SAFG had also provided a bid quote to PRASA for 236 lights valued at R2,471,061. In addition to this, an employee committed PRASA to procure additional lights at a cost of R58 million. Correct, legislated procedures were not followed in the procurement of these additional lights. At the completion of forensic investigations in 2016, only 24 lights of a total contract for 2000 lights had been provided³³ - this despite 92% (R53,618,790) of the contract already being paid. Based on a comparison of payments made and goods provided, PRASA has ultimately paid about R2,2 million per light.

²⁸ Nexus, *SA FENCE AND GATE - EXECUTIVE SUMMARY*. Available:

[<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/8.%20Nexus/SA%20FENCE%20AND%20GATE.pdf>]

²⁹ SA Fence and Gate website. Available: [<https://www.fng.co.za/index.php/about-us>]

³⁰ amaBhungane, *Insider claims collusion with 378M Prisons Tender*, Available: [<http://amabhungane.co.za/article/2017-06-26-insider-claims-collusion-with-r378m-prisons-tender>]

³¹ Nexus, *SA FENCE AND GATE - EXECUTIVE SUMMARY*. Section 6.

³² Nexus recommends disciplinary action against Mbatha and Mosholi for contravening Sec 75 of the PFMA

³³ Nexus, *SA FENCE AND GATE - EXECUTIVE SUMMARY*. Section 7.

A person identified as Lebaka allegedly instructed SAFG to procure additional lights through Top 6 Holdings (Pty) Ltd, resulting in additional costs amounting to R 27 986 245. According to Nexus, “this cost could have been avoided had PRASA procured it directly from the supplier Beka-Schreder (with whom it had done business before) and thus are seen to be fruitless and wasteful”. The procurement through Top 6 Holdings raises a reasonable suspicion, which is reportable in terms of the Prevention and Combatting of Corrupt Activities Act (PRECCA).

PRASA failed to provide the forensic investigator, Nexus with copies of evaluations concluded by the Corporate Tender & Procurement Committee (CTPC) to the GCEO as well as the recommendations from the GCEO to the Finance, Capital Investment and Tender Committee (FCIP). In the absence of the documents, Nexus concludes that “PRASA failed to do it, which renders the process irregular”³⁴

PRASA entered into a formal contract with SAFG (signed on 20 February 2013 and 25 March 2013 respectively). The CTP recommended a deviation of R40,341,400.89 be awarded to SAFG on 15 March 2013, subject to approval of the GCEO of PRASA. A Notice to Proceed was issued by the Senior Manager Procurement (Mosholi) to SAFG and confirmed the award of R47,083,730.37. As the FCIP awarded the initial contract, it also had to approve the deviation. PRASA failed to provide any documentation explaining the difference between the R40,341,400 recommended by the CTPC and the R47 million confirmed by Mosholi. PRASA failed to provide any proof that the FCIP approved the variation. Nexus concludes that in the absence of documentation that “the award was not fair, equitable, transparent, competitive and cost effective and thus regarded as irregular”.

Serious questions must be asked as to who stood to gain from this gross abuse of public resources. The networks of corruption appear to be pervasive, with SAFG also having been awarded tenders at Eskom and the Department of Correctional Services³⁵. As reported by amaBhungane, a whistleblower has made a series of explosive allegations against the Department of Correctional Services (DCS) and the SA Security Solutions and Technologies (SASSTEC) group, which is the holding company of SA Fence and Gate³⁶. The whistleblower alleged extensive collusion between DCS officials and SASSTEC leading up to the awarding of a R378 million tender for the Integrated Inmate Management System (IIMS) — a software solution to keep track of South Africa's 160 000 strong prison population. The whistleblower detailed the allegations in a letter to the standing committee on public accounts (Scopa), which is probing irregularities in the contract, awarded in November 2015.

SASSTEC, is also already embroiled in a dispute with the National Treasury over the tender, which was awarded to one of its subsidiaries. Treasury attempted to intervene even before the award, warning the National Commissioner for Correctional Services (Zach Modise) that the fact that only one bidder met the technical threshold risked rendering the process unfair, unreasonable and uncompetitive.³⁷ News24 reported

³⁴ Nexus, *SA FENCE AND GATE - EXECUTIVE SUMMARY*. Section 6.

³⁵ Basson, A., Van Wyk, P., Khoza, A. *Exclusive: R378m prisons tender scandal*. (News24, 2016). Available: [<https://www.news24.com/SouthAfrica/News/r378m-prisons-tender-scandal-20160414>]

³⁶ amaBhungane, *Insider claims collusion with 378M Prisons Tender*, Available: [<http://amabhungane.co.za/article/2017-06-26-insider-claims-collusion-with-r378m-prisons-tender>]

³⁷ amaBhungane, *Insider claims collusion with 378M Prisons Tender*, Available: [<http://amabhungane.co.za/article/2017-06-26-insider-claims-collusion-with-r378m-prisons-tender>]

in 2016 that National Treasury, had instructed Modise to apply steps to cancel the contract with any fruitless and wasteful expenditure incurred through cancelling the contract should be recovered from Modise personally³⁸.

Case Study 6. Resurgent Risk Management (RRM)³⁹

Resurgent Risk Management (RRM) are a security company that were co-founded by former State Security Agency Director General Arthur Fraser and former National Intelligence Agency boss Mr.. Manala Manzini. Mr.. Fraser already “stands accused of flouting tender processes and submitting false tax certificates” (Daily Maverick, 2017)⁴⁰. A contract to the value of R 52,871,837 was awarded to RRM on the basis of confinement. This confinement was at the instruction of the GCEO, Mr. Montana but the Corporate Tender and Procurement Committee (CTPC) did not recommend or approve the confinement application, as alleged in the recommendation report that was signed by the GCEO. The confinement application was also substantially unjustifiable in that there was no urgency, emergency, expertise that was unique, or grounds for secrecy. A budget was not even secured for the project before or after the GCEO signed the confinement request. With respect to the appointment of RRM through confinement, forensic investigators concluded that “it cannot be excluded that the disregard for proper process...was as a result of, or in lieu of, gratification as defined in PRECCA”.

Forensic investigators also found that “there are numerous and irreconcilable contradictions between the CTPC’s resolution in December 2014 and the approved conditions in the approved memorandum”. In light of this, they recommend that criminal action be taken against Dr Phungula and Mr. Mantsane on a charge of fraud, seeing as they misrepresented what the CTPC had approved. In addition, the investigating company Nexus recommended to Treasury and PRASA that criminal action should be taken against Mr.. Lucky Montana, the then GCEO for failing to comply with his fiduciary and general duties in his capacity as a member of the Accounting Authority. The Board is advised to report the RRM contract to the SAPS in terms of section 34 of PRECCA, to ensure compliance with its reporting duty. Furthermore, PRASA officials who would have known or at least suspected that the approval of the confinement was irregular, failed to take effective and appropriate steps to prevent irregular expenditure.

Further details pertaining to this contract include the fact that the payment plan was a result of an irregular approval; included a mobilisation fee that was not justified; and that investigators were unable to make any finding with respect to the goods or services received due to the lack of evidence and documentation within PRASA. The available evidence begs the question why PRASA then under the leadership of Deputy Minister Sifiso Buthelezi and Mr. Lucky Montana had no interest in monitoring this contract.

³⁸Basson, A., Van Wyk, P., Khoza, A. *Exclusive: R378m prisons tender scandal*. (News24, 2016). Available: [<https://www.news24.com/SouthAfrica/News/r378m-prisons-tender-scandal-20160414>]

³⁹Nexus, RESURGENT - EXECUTIVE SUMMARY. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/8.%20Nexus/RESURGENT.pdf>]

⁴⁰Thamm, M. *The Principal Agent Network (PAN) Dossier, Part I: Zuma and Mahlobo knew about Arthur Fraser's rogue intelligence programme*. (Daily Maverick, 2017). Available: [<https://www.dailymaverick.co.za/article/2017-12-05-the-principal-agent-network-pan-dossier-zuma-and-mahlobo-knew-about-arthur-frasers-rogue-intelligence-programme/#.WiDDt-nHIU>]

Case Study 7: S N Projects Management CC⁴¹

This contract, for vegetation control services, was awarded by closed tender to S N Projects Management, for an amount of R 22,600,000. The market-related rate for cutting vegetation is 15 cents per square meter and that for spraying herbicides is 22 cents per square meter. According to the S N Project Management invoice, PRASA were charged R6.60 per square meter, which is significantly inflated. S N Projects Management operates out of a residential property in Klerksdorp but was awarded this vegetation control contract in KwaZulu Natal. The company has no website or internet presence. Although classified as being owned by a black woman, the sole director and shareholder is listed as a Mr. Fesi.

During the evaluation process of tenders for this contract, the Tender Evaluation Committee (TEC) members all scored S N Projects Management identically, creating the suspicion that there was some collusion between TEC members with regards to the awarding of this contract. Furthermore, only three of the four TEC members signed Declaration of Interest confidentiality forms. Additional findings relating to this contract include the fact that the total value paid does not correspond with that stipulated in the contract. In terms of the contract, S N Project Management would receive 50% of the contract value once work was completed, with the balance after PRASA inspected the work. However, PRASA paid 8.5% (R1,925,893) after approximately six weeks.

Case Study 8: Supplier Development Programme and the Panel of Emerging Professional (sic) in Construction Industry⁴²

PRASA initiated a Supplier Development Programme (SDP) and the Panel of Emerging Professional (sic) in the Construction Industry (PEPCI) in 2012 in order to broaden the base of suppliers to PRASA and to ensure that the existing established construction and consulting/professional companies had more competition to bring down prices. They were intended to enable emerging black entrepreneurs and professionals to establish themselves as independent suppliers over a three-year period by partnering them with established companies.

In the case of the SDP, the business case was drafted by Mr. Bopape, the former senior manager of PRASA's Supply Chain Management Department on 2 May 2012 and signed off by the GCEO, Lucky Montana, on 14 May 2012. The GCEO approved the PEPCI on the 15th May, 2015, following a tender process.

PRASA SCM Policy provided for the CPO to procure, through an open tender process, a Competitive Database of professionals with set remuneration rates which would be valid for three years. The competitive database would have a minimum of five approved professional service providers per area of professional expertise. The professionals would be appointed on a rotational basis, to ensure equitable

⁴¹ Bowmans, *PRASA SN Project Management cc* (Report - Department of National Treasury, 2016). Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/1.%20Bowmans/PRASA%20SN%20PROJECT%20MANAGEMENT%20JK%2005.01.17.pdf>]

⁴² Bowmans, *PRASA SN Project Management cc* (Report - Department of National Treasury, 2016). Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/1.%20Bowmans/PRASA%20SN%20PROJECT%20MANAGEMENT%20JK%2005.01.17.pdf>]

distribution of work. Each award of such work based on technical proposals, every time such services were required.

The use of both the databases was restricted by legislation and policy to work valued under R350,000 and even then, a limited competitive process was required, requesting quotations and proposals for how the work would be undertaken. All the contracts under investigation exceeded R350,000 and the database therefore should not have been used, or should only have been used in exceptional cases.

Against PRASA policy, the GCEO signed off on a request to approve the appointment by “confinement” of companies listed in a memo dated 14 May 2012. 62 out of 63 SDP contractors were appointed as ‘confinement suppliers’. A similar blanket appointment was not provided for the PEPCI. However, the appointments from that panel were either justified using “confinement” or no justification was provided at all.

In all cases where the database was used without an open tender, the investigators were unable verify the justification for such use. In the words of one investigator, TGR, “the automatic selection from the database, one that stipulates that companies are selected on a rotational basis, suggests the database usurped the functions of BSC.”⁴³

The investigators were unable to establish how and why particular suppliers were selected to the SDP or how and why particular professionals were appointed to do work from the PEPCI. In all cases PRASA’s own process of limited quotations, assessment of proposals and use of rotation appears to have been flouted.

The findings in all these cases where a competitive process was not followed, were that the tenders constituted irregular expenditure. This is a significant finding given that over R1.5b was allocated through the two programmes.

While the Panel of Emerging Professional in the Construction Industry was established in terms of Supply Chain Management Policy, the design of this Supplier Development Programme contravenes the law and PRASA policy.

Further details on the findings in relation to the SDP are contained in Annexure 2.

Case Study 9: Swifambo⁴⁴

PRASA urgently required locomotives and tendered to lease about 80 train engines in 2013. The Swifambo case investigations was not a part of the Treasury Investigation, it was investigated by PRASA under Mr. Popo Molefe and it is the only matter that has been considered by a court. The judgment’s conclusions is

⁴³ TGR, Section 9.5. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/13.%20TGR/NT-%20PRASA%20Report.pdf>]

⁴⁴ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd (2015/42219)* [2017] ZAGPJHC 177; [2017] 3 All SA 971 (GJ); 2017 (6) SA 223 (GJ) (3 July 2017). Available: [<http://www1.saflii.org/cgi-bin/displ?file=za/cases/ZAGPJHC/2017/177.html&query=Swifambo>]

instructive for almost all areas of PRASA procurement and contract management, therefore, full finding by the Court on the tender specification is necessary. Justice Francis found the following:

The tailored specification and manipulated scoring

1. *In terms of the procurement policy, specifications should have been designed by the Cross Functional Sourcing Committee (CFSC). Instead the specifications were prepared by Mr. Mtimkhulu, who was masquerading as an engineer with a doctorate. He did not have such qualifications. The specifications ought to have been drafted to promote the broadest possible competition, to be based on relevant characteristics or performance requirements, and to avoid brand names or similar classifications.*
2. *Mtimkhulu adopted precisely the opposite approach to the benefit of Swifambo. In numerous instances items appeared to have been included in the specifications to ensure that Swifambo was awarded more technical points in the technical evaluation phase of the procurement process.*
3. *A few examples would suffice:*
 - i. *The specification stipulated the number of engine cylinders at a V12. The number of cylinders is irrelevant. Vossloh's locomotive had a V12.*
 - ii. *The bore and stroke specified was 230,19mm x 279.4mm. The bore and stroke is irrelevant. The specified bore and stroke figures were a precise match for Vossloh's locomotive.*
 - iii. *The engine speed of 904 rpm was specified. The engine speed is irrelevant. The engine speed of 904 rpm was a precise match for Vossloh's locomotive.*
 - iv. *The locomotive weight was specified as 88 tons. This was a precise match with Vossloh's locomotive.*
 - v. *A track gauge of 1065mm was specified. Vossloh's track gauge was 1067mm.*
 - vi. *The traction effort was specified as 305KN. This was a precise match with Vossloh's locomotive.*
 - vii. *A multi traction control with 27 pins was specified. The number of pins is irrelevant. Vossloh's locomotive had 27 pins.*
 - viii. *A monocoque structure was specified. Monocoque structures are more difficult to service as access to components for maintenance is made more difficult. Vossloh's locomotive has a monocoque structure.*
 - ix. *The specification repeatedly stipulated the UIC standard, which is a standard method of measurement published by the International Union of Railways and applied in Europe. In South Africa, the Association of American Railroads standards are applied, not the UIC standard.*
4. *The inclusion of irrelevant considerations meant that a manufacturer with different figures would receive far fewer points in the technical evaluation than Swifambo. The inclusion of the above items materially affected the award of the tender. If those items were excluded the tender would have been awarded to another bidder, GE South African Technology.*
5. *The uncanny consistency between irrelevant specifications and the locomotives supplied by Vossloh caused some members of the BEC to suspect that the tender had been rigged.*

6. *The inference is therefore irresistible that the specifications were tailored to benefit Swifambo. Swifambo did not attempt to provide an alternative explanation. The tailoring of the specification was insufficient for Swifambo to achieve the required 70% technical compliance threshold. Further manipulation of the scoring bids by members of the BEC was required. Without that intervention Swifambo would have been disqualified. The impact of the tailoring and intervention was so marked that Swifambo was the only bidder to achieve the technical threshold of 70%.*
7. *It is my finding that the methodology adopted in the scoring process was irrational and or unreasonable. The items contained in the specification were weighted according to their technical importance. The very purpose of the weighting is to discriminate between more and less important items. The weighting is critical to the proper assessment of the bids. The scoring was not done according to the allocated weights given to each item. The failure to do so contravenes paragraph 9.9 of the SCM procurement policy which expressly states that the evaluation of bids should be in terms of the evaluation criteria and the weightings. The scoring of diesel locomotives and hybrid locomotives on the same score sheet and combining and averaging the scores resulted in an illogical evaluation.*

The Court also found that Swifambo and its sole Director Auswell Mashaba was a front for the the Spanish multinational company Vosloh:

"There is sufficient evidence placed before me that proves on a balance of probabilities that the arrangement between Swifambo and Vossloh constituted fronting. It is clear that Swifambo under the agreement with Vossloh was merely a token participant that received monetary compensation in exchange for the use of its B-BBEE rating. The B-BBEE points were the only aspect that Vossloh could not satisfy. Vossloh could not bid on its own. Instead it concluded an agreement with Swifambo in which its B-BBEE points were exchanged for money. Vossloh maintains complete control over the operations of the business and Swifambo's role is constrained to minor administrative activities. There is no substantive empowerment evident under the agreement between Vossloh and Swifambo. There is no transfer of skills during the agreement or after.

The public has a clear interest in the social and economic rights sought to be give effect to in the B-BBEE Act. At the core of B-BBEE is viable, effective participation in the economy through the ownership of productive assets and the development of advanced skills. The B-BBEE Act criminalises conduct that retards the objectives of the Act. Section 130 of the B-



BBEE Act creates an offence where any person knowingly engages in a fronting practice.”⁴⁵

Abusing one’s racial classification to corruptly front for any White company or business person and in this case a European multinational is not only unlawful but immoral. Auswell Mashaba received R800 million for essentially doing nothing. From the judgment, it is also clear that Makhensa Mabunda had a direct stake in the Swifambo deal and investigative reporters have found that the then Board Chairperson Sfiso Buthelezi and his brother Nkanyiso Buthelezi were subcontracted “to manage the shipping and logistics” of the imported locomotives.⁴⁶ Forensic evidence uncovered by PRASA points to Angolan business woman Maria Gomes (a close friend of Jacob Zuma) and the ANC beneficiaries of corruption.

The Spanish multinational Vosloh (now owned by a Swiss company Stadler Rail Valencia) altered the contract from a lease to a sale and the specifications of the locomotives which do not fit our rail lines. On 15 January 2018, investigative journalist Pieter-Louis Myburgh reported that Treasury investigations uncovered “payments of over R75m” made to “S-Investments whose sole director is Makhensa Mabunda” by Vosloh Spain.⁴⁷ Justice Francis held:

Before doing so, if I take into account all the irregularities and the various steps that were taken by some employees of PRASA to hide those irregularities, this let Swifambo to gain a dishonest advantage which in this case was financial over other bidders and is tantamount to fraud. Fraud is defined as an act or course of deception, an intentional concealment, omission or perversion of truth to gain and unlawful or unfair advantage. The irregularities raised in this case have unearthed manifestation of corruption, collusion or fraud in this tender process. There is simply no explanation why Swifambo was preferred to other bidders.”⁴⁸

The #PrasaLeaks case studies demonstrate intentional concealment and perversions of truth by the Board, its Group CEO and a range of the agency’s employees from executive managers and chief procurement officers to middle-level staff. Corruption in these cases has caused immense harm to millions of people.

⁴⁵ The High Court of South Africa Gauteng Local Division, *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* (2015/42219) [2017] ZAGPJHC 177; [2017] 3 All SA 971 (GJ); 2017 (6) SA 223 (GJ) (3 July 2017). Available: [<http://www1.saflii.org/cel-bin/dispatch.pl?file=za/cases/ZAGPJHC/2017/177.html&query=Swifambo>]

⁴⁶ Myburgh, PL. *Deputy Finance Minister scored PRASA tenders as agency chair* (News24 June 2017) accessed 31 January 2018 <https://www.news24.com/SouthAfrica/News/exclusive-deputy-finmin-scored-prasa-tenders-as-agency-chair-20170605>

⁴⁷ News24 accessed 31 January 2018 <https://m.news24.com/SouthAfrica/News/exclusive-prasas-spanish-supplier-paid-r75m-consulting-fees-to-montanas-friend-20180114>

⁴⁸ *Swifambo judgment* (para 84)

5. Findings: What the investigative reports tell of PRASA irregular expenditure

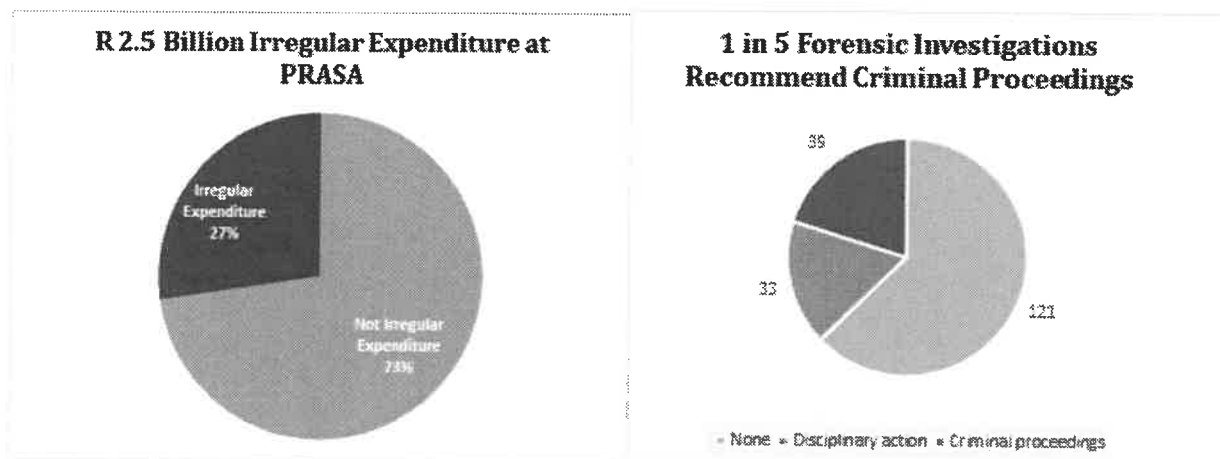
In compliance with the remedial action in the Public Protector's report, *Derailed* (2015), National Treasury commissioned forensic investigations into all contracts PRASA had entered into after 2012, which had a value in excess of R10 million. In order to do this, Treasury contracted 13 forensic investigatory firms to carry out the investigations. These investigatory firms were: Deloitte, PwC, KPMG, Bowman Gilfillan, ENS, Nexus, PPM, Funduzi, Strategic Investigations and Seminars, JGL Forensic Services, Gobodo Forensic Investigative Accounting, Sekela Xabiso and TGR.⁴⁹

The scope of the work carried out by the above forensic investigators was framed by a limited mandate, lack of investigative powers such as accessing bank records and time span. As such they do not constitute fully-fledged forensic audits, yet, they expose criminal syndicates and massive corruption in PRASA. The recommendations made by investigators are not legal opinions, but rather the reasoned conclusions drawn from the information, documentation and data made available to investigators by PRASA and the suppliers. The reports also reveal extreme levels of financial mismanagement and maladministration at PRASA.

5.1 R 2.5 billion in irregular expenditure: A look at the numbers

The 193 leaked forensic investigations available to Unite Behind reveal startling levels of corruption at PRASA. All thirteen investigators encountered a lack of documentation, irregular tendering or payment procedures relating to the contracts investigated. On various occasions, investigators noted an apparent unwillingness of senior PRASA officials to cooperate with the investigations and that for particular documents, PRASA either did not have, did not want to share, or had destroyed documents. For 124 out of the 193 reports, investigators cited a lack of documentation provided to them by PRASA. This figure represents the portion of investigations for which a lack of data was specifically mentioned in the report summaries/recommendations. Only 10 out of 193 reports mentioned that they had access to all necessary documentation. As a result, investigators were cautious in labeling expenditure as irregular, due to the insufficient evidence available to them, but noted that the lack of documentation in itself constitutes an irregularity which warrants disciplinary action and at times criminal action.

⁴⁹ All reports are available via GroundUp : <https://www.groundup.org.za/topic/prasaleaks/>

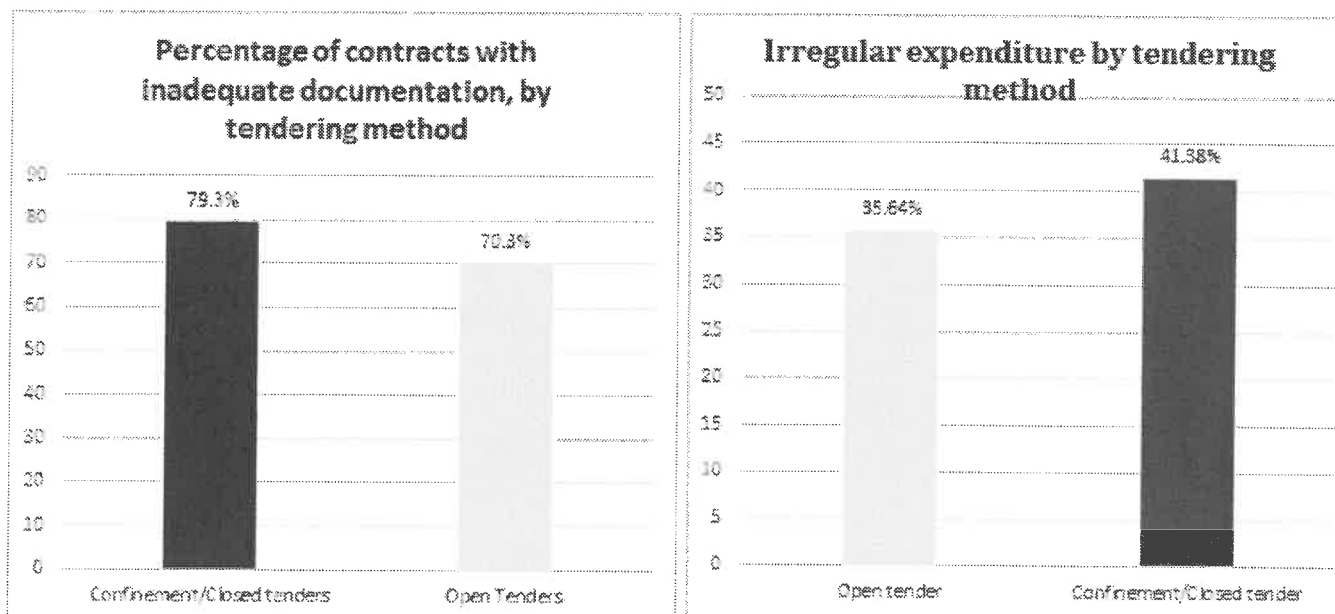


In deriving the figures for expenditure presented here, expenditure was flagged as irregular when the relevant report *explicitly* deemed it “irregular expenditure” or as an “irregularly awarded” contract or extension, in the findings. It should be noted that many reports used more conservative language to describe clearly flawed or inadequate procurement processes and thus, the methodology we adopted to derive these figures is likely to yield a conservative estimate. Using this methodology, we were able to derive that R2.5 billion in irregular expenditure had taken place in the context of the 193 investigative reports we reviewed. This represents more than a quarter of expenditure in all the investigated contracts. Missing information could have implications for an additional R3.5 billion in irregular expenditure.

In addition to the revelations concerning the extreme levels of irregular spending, these reports also make recommendations that PRASA be compliant with both its own internal policies as well as national legislation, such as the Prevention and Combating of Corrupt Activities Act (PRECCA). When we survey these findings, we find that one in five investigative reports recommend that criminal charges be laid against PRASA officials. An additional 33 reports recommended disciplinary action against PRASA officials, including, on various occasions, the then GCEO Lucky Montana, the Board of Control including its then chairperson and current Deputy Minister of Finance Sfiso Buthelezi.

For 127 out of the 193 reports available to us, the investigators attest to compromised procurement procedures. Related to this, we find that a significant proportion of tenders were awarded via confinement, a non-competitive process that is usually only indicated in very specific and recognised circumstances, such as emergencies arising from disasters. In the majority of these cases, investigators find that the reasoning for confinement was not warranted and led to an irregular procurement process. In addition, we also find



that the proportion of contracts which did not have adequate documentation was higher for contracts awarded through confinement than those awarded via open tendering processes.

5.2 Documentation: Leaving no paper trail

As indicated above, a key finding in all the forensic reports that were reviewed is the lack of record keeping. Despite numerous requests for access, documents and data were either missing altogether, misplaced, possibly destroyed or not made available to the auditors. In many instances, where documents were found, they tended not to comply with PRASA's Supply Chain Management (SCM) policy. Irregular documentation, in turn, renders expenditure to be irregular. We found that the problem of irregular or non-existent record keeping spanned the entire supply chain. All key SCM related offices in PRASA are implicated in the poor record keeping.

A further inference which may be drawn, based on the extent of the missing documentation, is that many of the steps in the normal supply chain process were simply not followed.

There is a specific legislative requirement to keep an audit trail from the very start of a procurement process – i.e. from the needs analysis. The following are just some of the examples found in the forensic reports of missing records: needs analysis; bid specification documentation; tender advertisements; procurement documents on the tender process; tender evaluation sheets; bid submission documents from unsuccessful tenderers; bid scoring sheets; inventories and unsigned documents.

Of particular concern are instances where tender specifications were found to be lacking. This has far reaching implications as it not only results in a flawed tender process but also impacts negatively on contract specifications, the ability to manage and monitor implementation and delivery and ultimately on the actual

services delivered. In some of the most important areas of engineering technical competency, scores were not noted or were accepted well below the minimum threshold⁵⁰.

In a number of instances, the forensic auditors reported that findings could not be made regarding payments because of lack of documentation. The absence of an audit trail facilitates the siphoning off of public funds and resources with impunity.

Given how widespread the lack of record keeping is, it is not unreasonable to assume that this is a deliberate strategy and not simply a case of poor or incompetence record keeping. In the Swifambo case the judge found that documents had been concealed, spirited away or destroyed. This judge found further that even after the then GCEO, Montana, had left PRASA,

*...he managed to obstruct the distribution of relevant information through a network of associates who were collaborating with him. Employees who did not follow were victimised or unfairly dismissed.*⁵¹

It is therefore probable that the lack of documentation is, in many cases, a deliberate failure to undertake many of the critical steps in the procurement process, combined with a deliberate attempt to hide corrupt actions. Where one or two cases emerge, it may be reasonable to recommend that PRASA institute more adequate document management and disciplinary action against staff responsible for poor record keeping.

While all the investigators made similar findings, they were not all equally bold in their recommendations, sometimes erring on the side of caution, given the paucity of records available for scrutiny.

However, this investigation had access to 193 investigations and the patterns of process abuse emerge across the board. Where this is so widespread as to affect the overwhelming majority of tenders and involve all levels of management, different conclusions are unavoidable. This, coupled with an apparent lack of delivery, irregular procurement processes and extensions and inflated prices, point to criminal conspiracy.

5.3 Capture of the procurement process

"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", and further that ...deviations from fair process may themselves too often be symptoms of corruption or malfeasance in the process. In other words, an unfair process may betoken a deliberately skewed process. Hence the 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

⁵⁰ Gobodo. *Gabade Building and Projects CC* (Forensic Investigation into various PRASA contracts -consolidated summary findings of final reports. 2016). Available:

[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/5.%20Gobodo/Consolidated%20summary%20report%20-%2031%20October%202016_eob.pdf/]

⁵¹ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* (2015/42219) [2017] ZAGPJHC 177; [2017] 3 All SA 971 (GJ); 2017 (6) SA 223 (GJ) (3 July 2017). Available: [<http://www1.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2017/177.html&query=Swifambo>]

*likelihood of efficiency and optimality in the outcome; and (c) it serves as a guardian against a process skewed by corrupt influence.*⁵²

- Justice Froneman, in his judgement in Allpay Consolidated Investment Holdings (Pty) Ltd v CEO of SASSA

Various reports highlighted complete disdain on the part of PRASA senior management for both PRASA's own Supply Chain Management policies as well as the Public Finance Management Act and other legislation and regulations. While not all the reports covered the full spectrum of the supply chain process, those that did reflected disregard of the entire supply chain process, from demand management requirements all the way through to contract management.

Demand Management

The Reports showed that PRASA only established a Bid Specification Committee (BSC)⁵³ in 2015. Prior to the establishment of the BSC, the Enterprise Project Management Office (EPMO) was responsible for approval of budget in respect of each project. It is unclear what further role the EPMO played in complying with PFMA demand management obligations. In the *Swifambo* case different committees failed dismally in meeting the Demand Management requirements, as illustrated by the following extract from the *Swifambo* court judgement:

*"In terms of the procurement policy, specifications should have been designed by the Cross Functional Sourcing Committee (CFSC). Instead the specifications were prepared by Mr. Mtimkhulu, who was masquerading as an engineer with a doctorate. He did not have such qualifications. The specifications ought to have been drafted to promote the broadest possible competition, to be based on relevant characteristics or performance requirements, and to avoid brand names or similar classifications"*⁵⁴

The failure to undertake proper demand management undermined virtually every tender under investigation, ensuring that bids could not be properly assessed, scoring would not result in the best supplier being selected, pricing could not be easily judged, contracts were inadequate and payments could be made unrelated to actual delivery against an objective specification. This failure was too widespread to be considered a reflection of inadequate technical expertise. It was more likely to be a deliberate attempt to manipulate the tender process, and to allow corrupt suppliers to be appointed.

Methods of procurement

A range of different procurement methods were used by PRASA management. There appear to have been very few instances where any of these methods were implemented in ways that were legislatively and policy

⁵² Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013)

⁵³ TGR Attorneys (TGR). *Siyaya Rail Infrastructure Solutions and Technology (Pty) Ltd*. (Investigation into Certain Supply Chain Management and Contract Award Irregularities by the Passenger Rail Agency of South Africa (PRASA), 2017) Section 9.5. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/13.%20TGR/NT-%20PRASA%20Report.pdf>]

⁵⁴ *Passenger Rail Agency of South Africa v Swifambo Rail Agency (Pty) Ltd* (2015/42219) [2017] ZAGPJHC 177; [2017] 3 All SA 971 (GJ); 2017 (6) SA 223 (GJ) (3 July 2017). Available: [<http://www1.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAGPJHC/2017/177.html&query=Swifambo>]

compliant. This resulted in 203 out of the 216 tenders being deemed by the investigators as, at the very least, irregular. The scale of irregularity in the methods of procurement supports our conclusion that this is more likely to have been the result of criminal collusion than poor management.

Competitive tenders are the legally required default process, whether through open advertised tenders or whether through calling for quotations from an approved database of suppliers. In only a few instances was a competitive tender process followed. Even in these cases, there were examples of manipulation in the scoring framework through to the actual scoring, and allowing suppliers without the required technical or financial capability to be awarded tenders⁵⁵.

PRASA made generous use of supplier databases, suggesting that “the database usurped the functions of Bid Specification Committee.”⁵⁶ as noted by forensic investigators TGR Attorneys. PRASA’s SCM policy encouraged the establishment of databases in order to support the development of emerging professionals and businesses, but limited to contracts under R350 000. However, all the tenders under investigation fall above this threshold, meaning supplier databases should not have been used. Secondly, when using the databases, the SCM management were still required to follow a competitive process by calling for quotations, assessing the proposals from the suppliers, and then awarding on a rotational basis to those who met the technical requirements.

There was no evidence submitted of any attempt to comply with PRASA policy or the PFMA when using the supplier or professional databases. Contracts were awarded both under the Supplier Development Programme and the Panel of Emerging Professional (sic).

The use of these databases was made worse in some cases, by allowing the appointed supplier to choose their own sub-contractors to support them. This meant contractors were undertaking PRASA work without having gone through any of verification on any of the required factors, from financial through to technical and B-BBEE status.

Confinement was the preferred method of procurement for many of the contracts, with the CGEO approving or ratifying the awarding of tenders based on this method. Confinement had strict rules which were routinely flouted by PRASA management. In the majority of such tenders, no documentation was provided to motivate or justify the use of confinement. Where documentation was provided to the investigators, the use of confinement could not be justified in terms of the SCM Policy^{57 58}.

⁵⁵ Gobodo, *Appointment of Supercare Service Group (Pty) Ltd.* (Forensic Investigation into various PRASA contracts - consolidated summary findings of final reports. 2016). Available: [\[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/5.%20Gobodo/Consolidated%20summary%20report%20-%2031%20October%202016_eoh.pdf\]](https://www.groundup.org.za/media/uploads/documents/PRASALeaks/5.%20Gobodo/Consolidated%20summary%20report%20-%2031%20October%202016_eoh.pdf)

⁵⁶ TGR Attorneys (TGR). *INVESTIGATION INTO CERTAIN SUPPLY CHAIN MANAGEMENT AND CONTRACT AWARD IRREGULARITIES BY THE PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)*. Page 78. Available: [\[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/13.%20TGR/NT-%20PRASA%20Report.pdf\]](https://www.groundup.org.za/media/uploads/documents/PRASALeaks/13.%20TGR/NT-%20PRASA%20Report.pdf)

⁵⁷ Deloitte, *Findings relating to the appointment of Lufthansa Consulting and the payments to this supplier*. Available: [\[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf\]](https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf)

⁵⁸ ENS Forensics (ENS), *EXECUTIVE SUMMARY OF SIYAYA DB CONSULTING ENGINEER CONTRACTS* Available: [\[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/3.%20ENS/ENS%20FORENSICS%20-%20EXECUTIVE%20SUMMARY%20OF%20PRASA%20INVESTIGATION.pdf\]](https://www.groundup.org.za/media/uploads/documents/PRASALeaks/3.%20ENS/ENS%20FORENSICS%20-%20EXECUTIVE%20SUMMARY%20OF%20PRASA%20INVESTIGATION.pdf)

In terms of the SCM Policy, confinement is allowed only where it is not possible to use a competitive bidding process and for practical reasons, only one or a select number of bidders are asked to provide a quotation. However this can still only be used under certain circumstances, such as: the appointment of professional services such as legal, financial, technical or security where unique expertise and/or security are required; in cases of emergency; in cases where the task represents a natural continuation of previous work carried out by a service provider and/or when only one or a limited number of firms are qualified and have met certain requirements.

It should be noted that in December 2015, PRASA's own internal audit declared all confinements irregular and all relevant contracts were stopped or cancelled.⁵⁹

There were a few examples of sole supplier tenders, use of closed tenders and unsolicited bids. These were often flagged as unwarranted by the investigators.⁶⁰

An additional finding, across multiple tenders, and only in part linked to lack of documentation, was that the scoring processes appear to have been manipulated. Evidence of this was score sheets incomplete and unsigned, BBBEE scores incorrectly allocated, suspected collusion in scoring, changing of scores, different weighting criteria used by different members of the BEC, technical thresholds dropped, scoresheets and weightings differing from advertised tender documents, final scores which were incorrectly calculated against actual evaluation.⁶¹

5.4 Inadequate contract management

Where investigators had access to sufficient information, they found, in some instances, very serious anomalies in the pricing of services against set norms and industry standards⁶², leading to spectacularly inflated contracts, as demonstrated in some of the above case studies.

The investigators were unable to access the overwhelming majority of contracts and therefore were unable to make definitive findings on compliance with normal contracting processes. This included being unable to see how the work specifications and standards had been set out in the contract versus how they were set out in the tender.

⁵⁹ Bowmans, *Investigation into 20 Selected contracts above R10 million awarded by PRASA from 2012 to date - Conogon Trading CC*, 19 December 2016, pp 23. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/1.%20Bowmans/PRASA%20CONOGON%20JK%2016%20JAN%202017.pdf>]

⁶⁰ Deloitte, *Findings relating to the appointment of Sobela Engineering (Pty) Ltd and the payments to this supplier*. Available: [https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf]

⁶¹ Consolidated PRASA Reports - Treasury Document; pp 5, 9, 10, 11, 12, 22, 23, 25, 28 Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/6.%20JGL/Last%20Consolidated%20PRASA%20Reports.pdf>]

⁶² Bowmans, *PRASA SN Project Management cc* (Report - Department of National Treasury, 2016). Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/1.%20Bowmans/PRASA%20SN%20PROJECT%20MANAGEMENT%20JK%2005.01.17.pdf>]

To repeat our conclusions above, it is not unreasonable to assume that this lack of detailed contracting was deliberate. It meant suppliers could not be held accountable for the work they were contracted and paid to deliver.

In any event, where the investigators had the capacity to check what work had been done, they found instances of either a partial or a complete lack of delivery⁶³, even though the suppliers had been paid in full, and in some cases, escalated amounts.

5.5 Payment processes

Across virtually every contract reviewed by the investigators, concerns are raised about payment processes. These include issues that range from simple ineptitude to gross legal violations. The various issues can be grouped under the following headings:

- Late payment, and paying contractors from the incorrect accounts;
- Incomplete payment documentation, including no records of payments or no sign-off on invoices where they do exist⁶⁴;
- Making payments outside of the contract period (both before and after);
- Payments made by persons with no authorisation to do so⁶⁵;
- Payments above the contractually agreed sum^{66 67};
- Payments broken down into smaller components in order to bypass the approval processes required for large amounts;
- Payments unrelated to delivery.

These violations are the deliberate consequence of the absence of sound demand, procurement and contract management, all pointing to criminal intent.

5.6 Total absence of accountability

Audit and Risk Committee statement from 2012/13 Annual Report “no matters were reported that indicate any material deficiencies in the system of internal control or any deviations there from. Accordingly, we can report that the system of internal control over financial reporting for the period under review was efficient and effective.” - M Salanje, Chairperson of ARMC

⁶³ Nexus, SA FENCE AND GATE - EXECUTIVE SUMMARY. Available:

[<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/8.%20Nexus/SA%20FENCE%20AND%20GATE.pdf>]

⁶⁴ Nexus, INTENSE - EXECUTIVE SUMMARY. Available:

[<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/8.%20Nexus/INTENSE.pdf>]

⁶⁵ Gobodo, Appointment of Inyatsi Construction (Pty) Ltd ; Appointment of Enza Construction (Pty) Ltd – Saulsville Station ; Appointment of Reutech Solutions (Pty) Ltd . Available:

[https://www.groundup.org.za/media/uploads/documents/PRASALeaks/5.%20Gobodo/Consolidated%20summary%20report%20-%2031%20October%202016_eoh.pdf]

⁶⁶ Gobodo, Appointment of Reutech Solutions (Pty) Ltd

⁶⁷ Strategic Investigations and Seminars. VUSA-ISIZWE SECURITY (PTY) LTD. (FORENSIC AUDIT TO VERIFY PRASA PAYMENTS, 2016.) p116. Available:

[<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/10.%20Strategic%20Investigations/RFP%20008-2015%20Final%20Report%20and%20Summary%20NT%20Prasa%2030-9-2016.pdf>]

The reports point to a complete absence of accountability throughout PRASA, from the Board, through to senior management, the Finance, Supply Chain and Internal Audit Departments, as reflected in the above quotation. While PRASA adopted generally sound Supply Chain Management policies which were aligned to national legislation, in practice the then Board and the senior management failed to implement both the letter and spirit of the policies and broader legislation.

The Board failed to exercise their duty to ensure the responsible protection of PRASA resources and services to the public and to hold the senior management to the highest professional and ethical standards. Deloitte made the following observation in their general findings:

*"There is no evidence to suggest that the PRASA board questioned any of the deviations. There is no evidence that the board intervened at any stage to question the procurement procedures followed. The board did not act with the necessary fidelity, honesty and integrity in the best interests of PRASA in managing its financial affairs as the PFMA requires of an accounting authority and in fact appears not to have played any role in relation to exercising care to protect the assets and records of PRASA. This warrants further investigation by the SAPS for possible contraventions of sections 50 and 51 of the PFMA read with sections 49, 83 and 86."*⁶⁸

The senior management failed to honour their duty of care when carrying out the delegated authority of the then Board. Instead, they appear to have led a process which resulted in the systematic haemorrhaging of PRASA resources and a concomitant deterioration of PRASA services. This failure is reflected in the daily suffering of commuters across the Metrorail services.

6. #UniteBehind's #PRASALeaks Recommendations

Parliament oversees the immediate implementation of the following recommendations:

6.1 Remove and investigate Sifiso Buthelezi

Parliament to demand that the President immediately remove Sifiso Buthelezi from his post as Deputy Minister of Finance, pending the outcome of further investigation into his fitness to hold office.

The Standing Committee on Public Accounts (SCOPA) and the Portfolio Committee on Finance to immediately begin an inquiry into the fitness of Sifiso Buthelezi to hold office.

Parliament through the Portfolio Committee on Transport must amend the *Legal Succession to South African Transport Services Act* (No. 9 of 1989) to make the appointment of the PRASA Board an open process and accountable to the National Assembly.

⁶⁸ Deloitte, *General conclusions and Recommendations*, (National Treasury: Forensic investigation into the appointment of and payments made to various service providers of the Passenger Rail Agency of South Africa (PRASA) 15 December 2016), Section 22.9, p156. Available: [https://www.groundup.org.za/media/uploads/documents/PRASALeaks/2.%20Deloitte/PRASA_Final%20Report_15%20December%202016.pdf]

6.2 Asset seizure & recovery of expenditure

The National Director of the National Prosecuting Authority (NPA) be requested and if necessary compelled through a court order by the Minister of Justice, to protect PRASA's assets and to institute asset forfeiture and investigations in terms of Section 22 of the *Prevention and Combating of Corrupt Activities Act* (12 of 2004) as well as the *Prevention of Organised Crime Act* (121 of 1998).

Assets of all local and international entities complicit in corrupt tenders to be frozen, pending the appointment of an independent comprehensive forensic audit into all the irregular PRASA contracts and the recovery of fruitless and wasteful expenditure.

6.3 Prosecution

The Directorate for Priority Crime Investigation (the Hawks/SIU) must be requested by Parliament to conduct an urgent and immediate investigations of all named people and companies, with the view to urgent prosecutions of all those who are implicated in corrupt activities relating to PRASA tenders, as required in terms of Section 17B and 17D of the *South African Police Service Act*. I

6.4 Investigation into the PRASA Board

The Hawks/SIU to provide a timely and professional forensic investigation into the then PRASA board to determine whether members of the Board benefited individually from the siphoning of public money to selected suppliers.

6.5 National public procurement reform

Amendments to the relevant legislation and Treasury guidelines to provide for much greater consequences for individuals and entities implicated in negligence, corruption and malpractice related to Public Procurement.



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7. The Rogues Gallery: The network of corrupt individuals who stole from the public and wrecked passenger rail for millions

WANTED LIST - POLITICS & BUSINESS



Jacob Zuma
President of South Africa.
At the centre of State Capture.



Roy Moodley
Owner of Royal Securities.
Close friend of Jacob Zuma.
Engaged in corrupt deals at PRASA



Arthur Fraser
State Security Agency Director General.
Involved in corrupt company dealings with PRASA.



Makhensa Mabunda
Director of S-Group & Siyaya.
ANC donor and accused of corrupt dealings with PRASA.



Mario Ferreira

Co-owner of Siyangena Technologies.
Company won irregular PRASA tenders
worth billions.



Auswell Mashaba

MD of Swifambo – criminal front
company for corrupt rail deal with
PRASA.



Peter Spuhler

Ex-CEO of Stadler Rail – parent company
involved in corrupt rail contract with
Swifambo.

Wanted List - PRASA



Lucky Montana

Group CEO

Presided over looting and widespread corruption, signed hundreds of dodgy deals.

Deloitte: "Numerous appointments happened via deviations. Mr Montana ... appears to have been involved in all such appointments we investigated"



Sfiso Buthelezi

Board Chair for 6 years. Current Deputy Finance Minister.



Josephat Phungula

Former Chief Procurement Officer.

Falsified qualifications.

"Fraud charges should be instituted against Dr Phungula,..."

– ENS



Rebecca Setino

Former PRASA Head of Supply Chain Management
Current Country Head Procurement & Supply Chain for Bombardier Transportation SA. Bombardier received a contract in excess of R1 billion for signalling from PRASA.

"...institute disciplinary action against Rebecca Setino in accordance with section 64B(4) of the Public Service Act, 1994 for "irregularly appointing BEC members in breach of the PRASA SCM policy" - Gobodo



Chris Mbatha

Former PRASA Chief Information Officer and Procurement Officer

"institute disciplinary action against Mr Mbatha for failure to comply with Section 45 of the PFMA" - Gobodo



Daniel Mtimkulu

Chief Engineer. Falsified qualifications. Involved in awarding of irregular and illegal tenders.

A handwritten signature in the bottom right corner of the page.

8. Annexures

Annexure 1: Legal Framework: Legislation and policies

The Constitution of the Republic of South Africa, 1996

The Constitution provides the overarching framework for PRASA. The Constitution sets out the basic principles which must be followed when PRASA procures goods or services. Section 195 of the Constitution sets out the basic values and principles governing the PRASA administration. These pieces of legislation call for the promotion and maintenance of high standards of professional ethics as well as efficient, economic and effective use of resources. The use of these resources, and PRASA as a whole, should be transparent, accountable and should encourage public participation in policy-making. Furthermore, PRASA should be development-oriented and provide fair, equitable, unbiased services that are responsive to our needs. PRASA should provide us with timely, accessible and accurate information. Good human resources management and career-development practices should be cultivated in a way that is broadly representative of the South African people. Employment and personnel management should be based on ability, objectivity and fairness, while also focussing on the need to redress the imbalances of our past in order to achieve this broad representation.

Section 217 of the constitution deals with procurement of goods and services by PRASA. The legislation states that any procurement should be "*fair, equitable, transparent, competitive and cost-effective.*" Procurement policy is allowed to have categories of preference in the allocation of contracts but should protect or advance people or categories of people who are disadvantaged by unfair discrimination.

Legal Succession to the South African Transport Service Act, 9 of 1989 & the Legal succession to the South African Transport Services Amendment Act, 38 of 2008

These Acts sets up PRASA as a State owned company. Sections 15 & 23 of the Act require the PRASA to provide a service that is in the public interest. Section 17 requires PRASA to act in the strategic and economic interests of the Republic and Section 3 of the Amendment Act requires PRASA to have due regard to key government social, economic and transport policy objectives.

National Land Transport Act, 5 of 2009

This Act places an obligation on the Minister of Transport to aim to further the process of transformation and restructuring of the national land transport system and to give effect to national policy, prescribe national principle, requirements, guidelines, frameworks and national norms and standards that must be applied.

The Minister must prescribe principles that apply to the determination, formulation, development and application of land transport policy in the Republic. The Minister must, among other, facilitate the increased use of public transport; ensure that the money available for land transport matters is applied in an efficient, economic, equitable and transparent manner.

The Minister must accommodate national and international benchmarks and best practice; promote the safety of passengers; encourage efficiency and entrepreneurial behaviour on the par of operators and

encourage them to tender competitively for contracts and concessions; promote a strategic and integrated approach to the provision of public transport; promote the efficient use of energy resources, and limit adverse environmental impacts in relation to land transport.

The Minister must also promote public transport that is effective in satisfying user needs; operates efficiently as regards the use of resources; is of an acceptable standard and readily accessible and is operated in conjunction with effective infrastructure provided at reasonable cost; is safe;

The Public Finance Management Act 1 of 1999 (PFMA)

Principles from the Constitution are set out in various pieces of legislation - the most important being the Public Finance Management Act, and various National Treasury Guidelines set out in terms of that Act. The PFMA places detailed obligations on the Board of PRASA and the CFO to avoid unauthorised, irregular, fruitless and wasteful expenditure and to put in place controls to prevent those forms of expenditure occurring. The PFMA also defines these forms of expenditure. Unauthorised expenditure relates to overspending on a particular allocated budget or when expenditure not in accordance with the particular budget. Irregular expenditure is any expenditure, excluding unauthorised, which is in contravention of or not in accordance with any legislative requirement. Fruitless and wasteful expenditure is expenditure which was made in vain and would have been avoided if reasonable care had been exercised.

The Broad-based Black Economic Empowerment (B-BBEE) Act 53 of 2003

This Act aims to redress the legacy of exclusion of black people from the economy pre-1999 through imposing preferential treatment for business composition and equity considerations in the tendering process.

The Preferential Procurement Policy Framework Act 5 of 2000 (PPPFA)

This Act provides guidance on striking a balance between weighting the functionality of the goods and services, incorporating pricing and ability to deliver, including considerations of equitable access to state contracts based on B-BBEE status.

The Prevention and Combatting of Corrupt Activities Act, 12 of 2004 (PCCA)

The PCCA Act requires any person who holds a position of authority at any level in PRASA or a supplier company, or anyone else who knows or ought to have known or suspected that another has committed an offence of corruption, fraud or theft involving R100 000 or more, to report this to SAPS.

PRASA Supply Chain Management (SCM) Policy

PRASA, like all other SOEs, are required to adopt Supply Chain Management policies so that the various pieces of legislation and regulations mentioned above are put into practice. PRASA's SCM policy was adopted by their Board in February 2009 and amended in September 2013. Compliance with this policy is critical. Vast sums of money are spent by PRASA on goods and service providers; the incentive for corruption is equally large.

Strict compliance with the SCM Policy by all levels of management is a critical check in curbing corrupt practices. This includes maintaining a full audit trail (paper or electronic) for scrutiny of all actions, recommendations and decisions.

The key Policy steps in PRASA's procurement process

1 Declaration of interest

All PRASA employees involved in bids must declare any conflict of interest and withdraw from the process if the employee, a close family member, partner or associate has any relationship of any kind with a bidder.

2 Demand Management

Treasury requires that there must be an *identified need* for the service and this need must be to fulfil one or more of PRASA's functions. A needs analysis must be undertaken and there should be a defined procurement strategy. Precise specifications of this need must be determined and it should be linked to budget. The industry which could supply this need should be fully analysed.

A Bid Specification Committee (BSC) must be established for all tenders above R350,000. This committee will undertake to develop the technical specifications for the tender document. The technical specifications will set out a need-specific method for procuring and disposing of the specific goods or services at PRASA. This should include preferential requirements, an appropriate preference point system for evaluation of any tenders, and deliverable or performance indicators against which the tender will be assessed. The BSC must also ensure that the technical specifications of tenders are legislatively compliant. These specifications will form the foundation on which the proposals from different service providers are evaluated. These will also form the substance of the contract with the selected service provider and the basis on which the contract is managed and paid for.

3 Inviting Tenders

The default process for inviting tenders is a competitive one and differs according to the value of the tender. A professional services database exists, from which tenders under R350,000 can be awarded. This process would involve requesting quotes from service providers who are established on the database and quotes can be approved by the CPO. The database should however, in the first instance, be created through a competitive process, which would also have verified the capability and preferential status of the various service providers. Any service provider on this database would be there for three years and their rates will also be set for those three years. Furthermore, the work must be allocated on a rotational basis to ensure equitable distribution. The competitive data base cannot be used for tenders over the value of R350,000.

The PPPFA sets out the preferential points system for all procurement above R30 000. A weighted points system is applied to those bidders who do not fail on the technical assessment (which will be described below):

- 80/20 price/B-BEEE for bids up to R1 million
- 90/10 price/B-BEEE for bids over R1 million

The following Preference Point Systems are applicable from 1 April 2017 to all Organ of State bids:

- the 80/20 Preference Point System for bids with a Rand value of more than R30,000-00 but not exceeding R50,000,000-00 (all applicable taxes included); and
- the 90/10 Preference Point System for bids with a Rand value above R50,000,000-00 (all applicable taxes included.)

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The Bid Evaluation Committee (BEC) makes recommendations to the Bid Adjudication Committee (BAC) that the tender be awarded to the bidder with the highest score, unless there are objective criteria which justify awarding the tender to another bidder. The BEC is required to maintain records relating to this process, to ensure the existence of an audit trail.

As a general rule, all other tenders (bar the exceptions set out below) must be competitive. This competitive process requires tenders to be publicly advertised with detailed information to prospective bidders on the specifications and bid assessment process. Exceptions to a competitive tender are allowed in cases of emergency, sole source, confinements and unsolicited bids.

The case of an *emergency* tender may occur in cases of disasters, system failures and security risks. When procuring emergency goods, work or services, this may be obtained by means of quotation, preferably using the departmental supplier database. The GCEO would have to ratify the motivation for emergency purchases.

Sole sourcing applies when there is actually only one supplier in the market. The GCEO must approve the use of sole sourcing prior to opening negotiations with a supplier.

Confinement occurs where it is not possible to use a competitive bidding process and for practical reasons, only one bidder is asked to provide a quotation, however this can still only be used in certain instances. This may include: the appointment of professional services such as legal, financial, technical or security where unique expertise and/or security are required, in cases of emergency, in cases where the task represents a natural continuation of previous work carried out by a service provider and/or when only one or a limited number of firms are qualified and have met certain requirements. Confinement was used extensively by PRASA during the period under review. Any motivation for confinement would need to be approved but the GCEO.

Unsolicited bids are those bids where a reverse situation occurs in that the supplier approaches PRASA with a proposal outside of any request put out by PRASA. Accepting such bids can only be done after PRASA confirms a need for the goods or services and once they have tested the market through an "Expression of Interest". This would help to ensure that the concept is unique and that there is no one else who can provide this good or service.

4 Assessing Bids

A Bid Evaluation Committee (BEC) is established to evaluate any bid against the specifications and points system set out in the Tender document (prepared by the Bid Specifications Committee described above).

The BEC is required to conduct (and document) the following verifications:

- Administrative compliance including tax clearance certificates, B-BBEE verification, capacity signatory, accreditation, VAT registration, price, number of items and declaration of past SCM practices. Failure to provide any of this information should result in the bid being disqualified.
- Bidders whose company or directors are on a restricted database, those who don't provide a valid tax clearance certificate from SARS, or those who have failed to perform against a previous contract, may not be awarded a tender.

- Evaluation in accordance with the technical criteria specified in the bid document and the prescripts of the PPPFA
 - The capability of the bidder to execute the contract, from a technical, managerial and financial perspective
 - Whether the bid is to specification in respect of quality, functionality, dimensions, design, customer support, guarantee, etc.
 - The number of contracts granted in the previous 12 months
 - Allocation of preference points
 - Representivity in the composition of the bidder and the possibility of fronting
 - Whether it is value for money
- Ensure all potential suppliers are legally compliant through ensuring completion of background checks

5 Awarding a tender

The Bid Adjudication Committee (BAC) recommend to the delegated authority who the bid should be awarded to. The SCM policy sets out who has the authority to sign off on tenders and contracts, subject to the total value of the contract. The thresholds approved by the Board authorised the following people to approve contracts within PRASA:

- Operating Tenders
 - GCEO: R100 million
 - CEOs of subsidiaries: R50 million
 - CFO: R50 million
- Maintenance & materials
 - CEOs of subsidiaries: R20 million
 - CFO: R20 million
 - CPO: R10 million

6 Entering into the contract

Once a bid is awarded, the Accounting Officer is required to undertake checks, once again, that the bidder, and all directors, shareholders or trustees, are not registered on a restricted database or tender defaulting register. The bidder must also be assessed, once again, to confirm they have the necessary facilities, capacity, capabilities and financial resources to deliver the goods and services promised. For contracts over R10 million, the financial capability must be confirmed in writing.

Once the bidder has been cleared, a contract is signed between the parties which assumes all original bid documents are part of the contract. The contract may include a service level agreement. Neither document may deviate from the original bid specifications.

Information about the award should be published, including contract number and description, name of successful bidder, details of B-BBEEE preference points of bidder, contract price, date the contract ends and when goods are being supplied, the brand name of these goods. The contract is not published.

7 Managing the contract

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The National Treasury published Contract Management Framework and Contract Management Guidelines in 2010. The Framework and guidelines support various sections in the PFMA which set out PRASA's financial managerial functions, including the effective, efficient, economic and transparent use of resources; and that all contractual obligations are settled and monies owing are paid within terms.

The two documents apply to the whole of government, including PRASA. They set out best practice and are not binding in the same way legislation and regulations are.

The Framework is a high level document and is supported by the detailed Guidelines. They recommend PRASA manage all stages of a contract life cycle. This starts with demand management and continues through to managing supplier relationships, managing the performance of suppliers according to the specifications in the contract, paying suppliers against actual services delivered, applying incentives and penalties and managing risks they emerge during a contract.

The Framework explains how poor contract management would result in poor supplier, buyer or other stakeholder relationships, negative public perception of PRASA, drawn out legal disputes, cost overruns, goods and services being purchased outside of specifications and in the worst case scenario, a complete failure of service delivery. The current dire state of services across PRASA's rail services are close to collapse and highlight the importance of proper contract management.

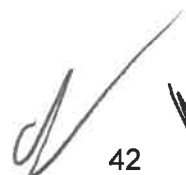

Consequences of failure to follow legislation and policy

The PRASA SCM Policy contains a Code of Conduct which provides for all role players involved in procurement processes to adhere to the National Treasury's Code of Conduct for SCM practitioners.

The consequences of PRASA's GCEO, CFO and SCM management not following proper processes range in severity. These include:

- Disregarding/disqualification of a bid
- Termination of tender process and instituting of legal processes
- Termination of contract and instituting of legal processes
- Disciplinary action which could result in dismissal
- Recovery of unauthorised, irregular or fruitless and wasteful expenditure from an employee who is responsible for non-compliance
- Asset forfeiture in the case of any individual who has benefitted from a corrupt act
- Criminal charges

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Annexure 2: Summary of Bowman's detailed findings on the Supplier Development Programme (SDP) and the use of confinement⁶⁹

The contracts awarded by confinement constitute irregular expenditure

The key finding of investigators is that all 62 contracts awarded by confinement constitute irregular expenditure. This is a significant finding given that R1.5b was allocated through this programme. In the view of investigators, all payments are irregular expenditure given the appointment irregularity. Procurement procedures used in SDP are in contravention of PRASA SCM policy and the PFMA. The PRASA Supply Chain Management (SCM) Policies do not make any specific provision for the SDP process.

The investigators note that the conditions for not applying a competitive tendering process in the allocation of contracts and, instead applying 'confinement' do not apply to the SDP. According to PRASA SCM policy "confinement" occurs "where the needs of the business preclude the use of the competitive tendering process and for practical reasons only one or a select number of tenderers are approached to quote for goods and/or services". Situations where the method of 'confinement' are used include but are not limited to the following:

1. The task that represents a natural continuation of previous work carried out by the firm;
2. An assignment where only one or a limited number of firms are qualified or have experience of exceptional worth for the assignment;
3. Appointment of professional services such as legal, financial, technical contracts and security where unique expertise and/or security are required; and
4. It is an emergency.

Ad hoc contracts terminated by PRASA as declared irregular

In December 2015 PRASA internal audit declared all confinements irregular and all relevant contracts were stopped or cancelled. Reasons given were that:

1. The preferential point system had not been applied as required by the Preferential Procurement Policy Framework Act for contracts above R30 000, especially the application of the 90/10 point system.
2. The lack of transparency of placing emerging suppliers on the ad hoc supplier list for the provision of infrastructure and rolling stock on an 'as and when' basis.
3. The technical capability and capacity of suppliers placed on the ad hoc supplier lists was not assessed as contractors were not appointed on the basis of a confinement.
4. The suppliers placed on the ad hoc list did not have the CICB grading applicable to their allocated contract values in case of construction projects.

Apart from the fact that the design of the SDP contravenes PRASA SCM policy and the provisions of the PFMA in general, significant specific additional irregularities were found in contracts falling under the programme in relation to the process of appointment, the payments and the services rendered. The following summarises issues arising from the investigator's findings into only 12 of the 63 contracts and in

⁶⁹ Bowmans, *EXECUTIVE SUMMARY OF FINDINGS AND OPINION*. Available: [<https://www.groundup.org.za/media/uploads/documents/PRASALeaks/1.%20Bowmans/PRASA%20GENERAL%20REPORT%2010%20ENTITIES%20JK%20%2016%20JAN%202017.pdf>]

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9 of those, investigators were unable to make findings on payments or goods supplied due to the absence of relevant information or documents. In all cases, missing documentation posed a significant challenge for investigators.

Additional irregularities with the process of appointment:

1. The investigators do not mention any evidence that the emerging suppliers were partnered with established suppliers and were eventually accredited as having the capacity and competence to undertake the work; the suppliers appear to have been simply granted technically complex work without a process of preparation and accreditation. Suppliers performed electrical and mechanical refurbishment of coaches when the nature of their business is registered as 'agriculture, hunting, forestry and fishing' with the Companies and Intellectual Property Commission (CIPC). This obviously poses significant safety risks for passengers and staff of PRASA apart from the potential for fruitless and wasteful expenditure it suggests.
2. Irregular contract periods were applied – for example, a contract was awarded for a period of 5 years in breach of PRASA SCM policy which does not allow for contracts exceeding a 3 year period.
3. Possible evidence of grooming / manufacturing of companies in order to specifically benefit from the SDP which is contrary to the design of the programme which was intended to target existing emerging suppliers. In one case, the company appears to have been registered only shortly before being allocated a contract.
4. Companies were appointed to the SDP which were not registered in the CIPC data base as working in a relevant industry, for example as noted above, two companies that received contracts to provide "ad hoc repair work, call out and technical support on an 'as and when' required basis", indicate on the CIPC that the nature of their business is 'agriculture, hunting, forestry and fishing'.
5. Contracts were awarded in instances where there is no evidence that the supplier had been issued with an accreditation certificate before being awarded the contract or had accreditation certificates that would expire before the contract was completed. An accreditation certificate is issued when the competence and capacity of a supplier has been verified.
6. Contracts were awarded without any evidence of a competitive bidding process or evidence that the supplier awarded the contract had provided a quotation.
7. Vendor registration information could not be provided by PRASA for particular suppliers.
8. Contracts were awarded to people who had been directly implicated in previous cases of fraud, one for example, involving R3.6m, and where the PRASA contract was also found to include over-charging of approximately R9m where the goods were not supplied as specified.
9. In at least one instance, two directors of one supplier awarded a contract were also directors in a large and well-established long term supplier to PRASA already benefiting from large tenders.
10. In one case, investigators found that the exact matching of bid evaluation scores suggests collusion may have taken place and in other cases, there is no clear reason evident for the selection made.
11. In one case, an approximately R22m contract was awarded to a company that had not been approved for the SDP list of suppliers and did not appear on the list.

Additional irregularities related to payments found by investigators:

1. Investigators were not able to verify a significant percentage of the amounts paid by PRASA to suppliers in the SDP because documentation was incomplete. In one example, the investigators were unable to verify 81% of the amounts paid by PRASA, that is, they were unable to verify just under R7m, against physical invoices. In another case 64% of payments or approximately R22.5m could not be verified against

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physical invoices. Out of just 12 of the 63 contracts, therefore, R29.5m in payments could not be matched to invoices.

2. Over-invoicing was not picked up / corrected by PRASA. In one example, PRASA failed to notice / correct over-invoicing amounting to R4 360 500 overcharge over 24 months in the case of a company contracted to supply 16 minibuses and 16 drivers but which only supplied 10 minibuses with the remaining 6 being supplied by PRASA depots. In this case the contract was extended by a further 5 months and then a further 4 months while a new tender was prepared. This company was then again awarded the new contract and continued to over-charge by R4 360 500. This resulted in at least R9m payment for goods not provided, that is fruitless and wasteful expenditure. In a second case, the investigators establish that the standard contract price for vegetation control was R0.15 per square meter for clearing and R0.22 for spraying herbicides when the actual contractor was paid R6.60 per square meter.

3. Payments were made contrary to the terms stipulated in the contract, for example, just under R2m payment was made to a company before the conclusion of the contract despite the contract stipulating that no payment would be made until completion.

4. Significant percentages of payments could not be verified against acceptance certificates. An acceptance certificate indicates that all conditions required to be met have been met before payment is made. In one instance, investigators were unable to reconcile R7 207 991 (86%) against PRASA acceptance certificates indicating that all conditions have been met for payment. In another case, investigators were unable to reconcile 81% of the total of just under R33m paid against acceptance certificates.

Bowmans' conclusions and recommendations for action

Investigators had the following conclusions and recommendations:

1. Appointment of vendors in terms of the SDP are in contravention of the PRASA SCM policies and the PFMA.
2. All awards and appointments of contractors made under SDP can be considered in contravention of PRASA's SCM policy and should be regarded as irregular expenditure and reported as such.
3. The PRASA board should consider its legal remedies against individuals involved with regard to possible disciplinary action, criminal investigation and / or civil recovery of losses. Further investigation would be needed.
4. All fruitless and wasteful expenses should be recovered from the supplier.
5. Internal control processes as per National Treasury guidelines for irregular expenditure should be developed and implemented.
6. The identical scoring of the Technical Executive Committee creates the suspicion that there was at least some collusion or discussion between TEC members with regard to the awarding of this contract.

Specific PRASA staff involvement

Requests for approval of suppliers to Supplier development programme were compiled by:

1. Request 1: Mr. Bopape (Snr manager SCM),
2. Requests 2. and 3 'Dr' Mtimkhulu (EM: Engineering Services). Dr' Mtimkhulu was fired in August 2015 for falsely claiming to have engineering qualifications. He claimed to have designed the Afro 400 while in fact he had ordered it. It was later delivered and proved to be unsuitable for the gauge used on South African railways.
3. Request 4. Dr Phungula (Group CPO).

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4. Requests were recommended by Mr. Mofi PRASA Rail CEO and Mr. Zamxaka PRASA Technical CEO.
5. Requests were approved by GCEO Lucky Montana or acting GCEO Ms Ngoye.

The four Technical Executive Committee members whose bid evaluation scoring of a contract worth just over R22.5m, and reported to be highly inflated in relation to standard pricing, was so identical that the investigator suspected collusion were:

1. Ms Phumeza Cwayi
2. Mr. Vukosi Shirinda
3. Ms Sarah du Plessis
4. Mr. Sydney Bonongo.

It should be noted that the responsibility of the Board in regard to the SDP was not mentioned in the investigations. Given that the programme ran from 2012 to 2015, it seems likely that the Board will have been aware of it. It is not clear who initiated the process of declaring the SDP programme irregular in 2015 and who decided it should be closed.

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