

ADVISORY REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND SECTION 8(1), READ WITH SECTIONS 6(4)(c)(ii), AND (d)(iii) OF THE PUBLIC PROTECTOR ACT, 1994 OF THE PUBLIC PROTECTOR ACT, 1994



**PUBLIC PROTECTOR
SOUTH AFRICA**

REPORT NUMBER: 02 OF 2024/2025

ISBN NUMBER: 978-1-7764955-9-7

INVESTIGATION INTO ALLEGATIONS OF CONTRAVENTION OF TRANSNET SOC LTD'S POLICIES IN RELATION TO A PAYMENT OF THREE HUNDRED AND FIFTY THOUSAND RAND, MADE TO THE POPO MOLEFE FOUNDATION CHARITABLE TRUST BY MNCEDISI NDLOVU & SEDUMEDI ATTORNEYS WHEN DR POPO SIMON MOLEFE WAS A SITTING CHAIRPERSON OF THE BOARD OF DIRECTORS OF TRANSNET

TABLE OF CONTENTS

ITEM	DESCRIPTION	PAGE NO.
	LIST OF ACRONYMS AND ABBREVIATIONS	2
	EXECUTIVE SUMMARY	4
1.	INTRODUCTION	12
2.	THE COMPLAINT	13
3.	POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR	14
4.	ISSUES IDENTIFIED FOR INVESTIGATION	16
5.	THE INVESTIGATION	17
6.	THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS	24
7.	FINDINGS	71
8.	OBSERVATIONS	73
9.	RECOMMENDATIONS	74
10.	MONITORING	76

LIST OF ACRONYMS AND ABBREVIATIONS

ACRONYMS / ABBREVIATIONS	DESCRIPTIONS
CEO	Chief Executive Officer
CIPC	Companies and Intellectual Properties Commission
Companies Act	Companies Act, 2008, as amended
Complainant	Ms Omphile Maotwe, MP
Constitution	Constitution of the Republic of South Africa, 1996
CSO	Chief Security Officer
Disclosures Policy	Declaration of Interest and Related Party Disclosures Policy for Non-Executive Directors approved on 27 August 2015
DOI	Declaration of Interests
EMEA	Executive Members' Ethics Act, 1998
Executive Ethics Code	Executive Ethics Code, 2000
GCE	Group Chief Executive of Transnet
Gifts Policy	Gifts and Hospitality Policy approved on 14 September 2014
Investigation Team	Public Protector South Africa Investigation Team
Investigation SOP	Transnet Investigations and FRM [Forensic Risk Management] Standard Operating Procedure effective from 19 April 2021
Legal Policy	Transnet Group Legal Policy approved on 11 April 2016
MEC	Member of Executive Council
MNS Attorneys	Mncedisi Ndlovu & Sedumedi Attorneys
PFMA	Public Finance Management Act, 1999 (as amended)
Popo Molefe Foundation	Popo Molefe Foundation Charitable Trust

ACRONYMS / ABBREVIATIONS	DESCRIPTIONS
PRECCA	Prevention and Combating of Corrupt Activities Act, 2004
Public Protector Act	Public Protector Act, 1994 (as amended)
Public Protector Rules	Rules Relating to Investigations by the Public Protector and Matters Incidental thereto, 2018 (as amended)
Transnet	Transnet SOC Ltd
Transnet Board	Transnet Board of Directors
Transnet Commitment Statement	Transnet Code of Ethics Commitment Statement
Transnet Ethics Code	Transnet Code of Ethics approved on 27 August 2015
Trust Deed	Amended Trust Deed of the Popo Molefe Foundation Trust (IT:37.../19...T)

EXECUTIVE SUMMARY

- (i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1), read with sections 6(4)(c)(ii), and (d)(iii) of the Public Protector Act, 1994 (the Public Protector Act).
- (ii) The report relates to an investigation into allegations of corruption, conflict of interest and/or contravention of Transnet SOC Ltd's (Transnet) policies in relation to a payment of three hundred and fifty thousand rand (R350 000), made to the Popo Molefe Foundation Charitable Trust (Popo Molefe Foundation/Trust) by Mncedisi Ndlovu & Sedumedi Attorneys (MNS Attorneys) when Dr Popo Simon Molefe (Dr Molefe) was a chairperson of the Board of Directors of Transnet (Transnet Board).
- (iii) The investigation originates from a complaint lodged with the Public Protector by the Treasurer General of the Economic Freedom Fighters (EFF), Ms Omphile Maotwe, MP (the Complainant), through a letter dated 15 November 2020.
- (iv) In her complaint, the Complainant raised the following issues for investigation:
 - (a) Whether the payment of R350 000 made to the Popo Molefe Foundation by MNS Attorneys in April 2019, was not in contravention of clause 11.2.2 of the Transnet Ethics Code, which requires employees and non-executive directors of Transnet to act with integrity and professionalism by "*refraining from using a position of authority and/or facilities provided by Transnet to further personal interests or that of friends and relatives*"; as Dr Molefe was a sitting chairperson of the Transnet Board when the aforesaid transaction was concluded;

- (b) Whether the payment by MNS Attorneys to the Popo Molefe Foundation did not affect or unduly influence Dr Molefe's independence and his relationship with MNS Attorneys as a service provider to Transnet;
- (c) Whether the said payment by MNS Attorneys to the Popo Molefe Foundation was due to a corrupt relationship between Dr Molefe and MNS Attorneys or any of its officials; and
- (d) Whether Transnet investigated reports of alleged corruption in respect of a payment to the Popo Molefe Foundation in terms of clause 5.3 of the Transnet Ethics Code.
- (v) Based on the analysis of the complaint, the following issues were considered and investigated:
 - (a) Whether Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by Mncedisi Ndlovu & Sedumedi Attorneys, a service provider to Transnet, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and in terms of section 6(5)(b) of the Public Protector Act; and
 - (b) Whether Transnet SOC Ltd failed to investigate allegations of corruption against Dr Popo Molefe in terms of clause 5.3 of the Transnet Ethics Code, in relation to the payment of R350 000 to the Popo Molefe Foundation Charitable Trust by MNS Attorneys, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act.

- (vi) The investigation was conducted in terms of section 182(1) of the Constitution and section 6(5) of the Public Protector Act. It included an analysis of all the relevant documents, application of relevant laws, case law and related prescripts.

- (vii) On 20 May 2024, notices in terms of section 7(9)(a) of the Public Protector Act, (section 7(9) Notices) were delivered to the Dr Molefe, the erstwhile Minister of Public Enterprises, Mr Pravin Gordhan, MP (Mr Gordhan), Chairperson of the Transnet Board, Mr Andile Sangqu (Mr Sangqu), and the Group Chief Executive of Transnet (GCE), Ms Michelle Phillips (Ms Phillips), to afford them an opportunity to respond to the likely findings and proposed recommendations. Section 7(9) Notice was also delivered to the Complainant on 21 May 2024. Section 7(9)(a) provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding the likely detrimental implication and/or recommendation.

- (viii) Through a letter dated 30 May 2024, Mr Gordhan indicated that he noted the proposed recommendations as contained the section 7(9) Notice and undertook to ensure that Transnet Board implements the commendations upon receipt of a final report.

- (ix) Through a letter dated 04 June 2024, Harris Nupen Molebatsi (HNM Attorneys) on behalf of Dr Molefe, advised in light of the preliminary findings contained in the section 7(9) Notice, Dr Molefe would not be making further submissions with regard to the matter.

- (x) Ms Phillips, on behalf of Transnet, responded to the section 7(9) Notice through a letter dated 10 June 2024. She indicated that Transnet recognises the need to review and potentially amend Transnet's policies for consistency, especially regarding the Standard Operating Procedure (SOP) for complaint handling and investigations and the Anti-Fraud and Corruption

Policy. She further indicated that the No Gifts and Hospitality Policy is also due for review in the current financial year and would be reviewed as against the recommendations outlined in the report from the Public Protector.

- (xi) The Public Protector did not receive any acknowledgement or substantive response from the Complainant regarding the section 7(9) Notice.
- (xii) Having regard to the evidence and regulatory framework determining the standards that Dr Molefe and Transnet should have complied with, the following findings are made:
 - (a) **Whether Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by Mncedisi Ndlovu & Sedumedi Attorneys, a service provider to Transnet, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and in terms of section 6(5)(b) of the Public Protector Act**
 - (aa) The allegation that Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by MNS Attorneys, a service provider to Transnet, **is not substantiated.**
 - (bb) MNS Attorneys was already a service provider to Transnet, prior to the appointment of Dr Molefe as chairperson of the Board, furthermore, MNS Attorneys was receiving instructions to do work before his appointment. No

evidence could be found to suggest that MNS Attorneys had an unfair advantage emanating from the relationship with the Popo Molefe Foundation. The Public Protector could not find evidence suggesting that Transnet facilities in both tangible or intangible forms as envisaged in Clause 11.2.2 of the Transnet Ethics Code, were used or employed in the soliciting of the sponsorship by the Popo Molefe Foundation.

- (cc) Furthermore, there is no evidence that Dr Molefe sought to use his position or Transnet facilities to advance his private interests, or actually derived any benefit at the expense of Transnet as a result of the sponsorship made to the Popo Molefe Foundation or took decisions which were prejudicial to Transnet resulting therefrom.
- (dd) The Public Protector found that Dr Molefe declared his interests in the Popo Molefe Foundation and could not find evidence indicating that Dr Molefe has a personal financial interest in MNS Attorneys, which required him to declare to Transnet as contemplated in section 75 of the Companies Act and the provisions of the Disclosures Policy
- (ee) Accordingly, the Public Protector could not find evidence to conclude that the conduct of Dr Molefe constitutes improper conduct as contemplated in section 182(1)(a) of the Constitution and section 6(5)(b) of the Public Protector Act.
- (b) **Whether Transnet SOC Ltd failed to investigate allegations of corruption against Dr Popo Molefe in terms of clause 5.3 of the Transnet Ethics Code, in relation to the payment of R350 000 to the Popo Molefe Foundation Charitable Trust by MNS Attorneys, if so, whether such conduct is improper as envisaged in section 182(1)(a) of**

the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act

- (aa) The allegation that Transnet failed to investigate allegations of corruption against Dr Molefe in relation to the payment of R350 000 to the Popo Molefe Foundation by MNS Attorneys in terms of clause 5.3 of the Transnet Ethics Code, **is not substantiated.**
- (bb) The Transnet Ethics Code does not provide for the procedure to be undertaken for the investigation of complaints against non-executive directors as contemplated in clause 5.3, considering that Board members are not employees.
- (cc) Accordingly, the conduct of the Transnet Board does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

(xiii) **OBSERVATIONS**

- (a) The Public Protector's investigation identified deficiencies relating to the absence of a clear procedure and process for the reporting and investigation of violations of the Transnet ethics related policies by members of the Board. Although, this had been partially addressed through the Transnet Commitment Statement, which was approved by the Transnet Board on 31 May 2023, there is no SOP providing for a detailed procedure and process to be followed.
- (b) The Public Protector further observed that paragraph 4 of the Investigation SOP, contains an exclusion for the Investigations and FRM department to conduct investigations against the Board members and stipulates that such investigations should be handled through a separate process, yet to be

established. The Public Protector observed that, a separate process that was proposed in 2021 is still outstanding.

- (c) The Public Protector is of the view that it is imperative that Transnet and the shareholder Department determine the process to be followed to report and investigate complaints against non-executive directors.
- (d) In its response to the section 7(9) Notice, Transnet recognised the need to review and potentially amend Transnet's policies for consistency, especially regarding the SOP for complaint handling and investigations, and Anti-Fraud and Corruption Policy. Transnet further identified the No Gifts and Hospitality Policy as the appropriate vehicle to accommodate the recommendation that non-executive directors should be required to disclose any donations and/or sponsorships received directly, in their personal capacity, or indirectly, accruing to other private interests, such as Non-Profit Organisations, Trusts, Foundations, from service providers doing business with Transnet.
- (xiv) In light of the observations, the following recommendations are made in terms of section 6(4)(c)(ii) of the Public Protector Act.

The Minister of Public Enterprises

- (a) Take note of the report and **within one hundred and twenty (120) days**, facilitate the development of a procedure for the reporting and investigation of complaints against non-executive directors in terms of section 15(3) of the Companies Act, 2008, as amended, read with paragraph 6 of the Transnet's Memorandum of Incorporation.

The Transnet Board of Directors

- (b) Must take note of the report and ensure that **within one hundred and twenty (120) days** the GCE develops the SOP dealing with the complaint handling process and investigations concerning the Investigations personnel, the CSO the GCE and Board members as contemplated in paragraph 4 of the Investigation SOP and the referral process stipulated in paragraph 16.1 of the Anti-Fraud and Corruption Policy.
- (c) **Within one hundred and twenty (120) calendar days** upon receipt of the final report, review the Declaration of Interest and Related Party Disclosures Policy for Non-Executive Directors, 2021 and/or related governance instruments to require the Non-Executive Directors to disclose, **within thirty (30) calendar days**, any donations and/or sponsorships received directly, in their personal capacity, or indirectly, accruing to other private interests, such as Non-Profit Organisations, Trusts, Foundations, from service providers doing business with Transnet, in terms of section 15(3) of the Companies Act, 2008, as amended, read with paragraph 6 of the Transnet's Memorandum of Incorporation.

The Group Chief Executive of Transnet

- (d) **Within one hundred and twenty (120) calendar days** upon receipt of the final report, take steps to ensure that a separate process is established and approved to deal with the complaint handling process and investigations concerning the Investigations personnel, the CSO, the GCE and Board members as contemplated in paragraph 4 of the Investigation SOP and the referral process stipulated in paragraph 16.1 of the Anti-Fraud and Corruption Policy.

1. INTRODUCTION

- 1.1 This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1), read with sections 6(4)(c)(ii), and (d)(iii) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 Section 182(1)(b) of the Constitution empowers the Public Protector to report on any conduct in state affairs that is suspected to be improper or to result in any impropriety or prejudice and section 8(1) of the Public Protector Act provides that the Public Protector may make known the findings, point of view or recommendation of any matter investigated by her. Furthermore, section 6(4)(c)(ii) empowers the Public Protector to make any appropriate recommendation she deems expedient to the affected public body or resolve a complaint by any means that may be expedient in the circumstances.
- 1.3 This report is submitted to the following persons to note the outcome of the investigation and the Public Protector's recommendations:
- 1.3.1 The Minister of Public Enterprises;
- 1.3.2 Dr Popo Molefe, former Chairperson of the Board of Directors of Transnet;
- 1.3.3 Mr Andile Sangqu, Chairperson of the Board of Directors of Transnet;
- 1.3.4 Ms Michelle Phillips, Group Executive of Transnet, and
- 1.3.5 Ms Omphile Maotwe, MP, the Complainant.
- 1.4 The report relates to an investigation into allegations of corruption, conflict of interest and/or contravention of Transnet SOC Ltd's (Transnet) policies

in relation to a payment of three hundred and fifty thousand rand (R350 000), made to the Popo Molefe Foundation Charitable Trust (Popo Molefe Foundation/Trust) by Mncedisi Ndlovu & Sedumedi Attorneys (MNS Attorneys) when Dr Popo Simon Molefe (Dr Molefe) was a chairperson of the Board of Directors of Transnet (Transnet Board).

2. THE COMPLAINT

2.1 The investigation originates from a complaint lodged with the Public Protector by the Treasurer General of the Economic Freedom Fighters (EFF), Ms Omphile Maotwe, MP (the Complainant), through a letter dated 15 November 2020.

2.2 In her complaint, the Complainant, *inter alia*, raised the following issues for investigation:

2.2.1 Whether the payment of R350 000 made to the Popo Molefe Foundation by MNS Attorneys in April 2019, was not in contravention of clause 11.2.2 of the Transnet Ethics Code, which requires employees and non-executive directors of Transnet to act with integrity and professionalism by “*refraining from using a position of authority and/or facilities provided by Transnet to further personal interests or that of friends and relatives*”; as Dr Molefe was a sitting chairperson of the Transnet Board when the aforesaid transaction was concluded;

2.2.2 Whether the payment by MNS Attorneys to the Popo Molefe Foundation did not affect or unduly influence Dr Molefe’s independence and his relationship with MNS Attorneys as a service provider to Transnet;

- 2.2.3 Whether the said payment by MNS Attorneys to the Popo Molefe Foundation was due to a corrupt relationship between Dr Molefe and MNS Attorneys or any of its officials; and
- 2.2.4 Whether Transnet investigated reports of alleged corruption in respect of a payment to the Popo Molefe Foundation in terms of clause 5.3 of the Transnet Ethics Code.
- 2.3 The Complainant further requested the Public Protector to investigate the allegations of corruption as published in an article titled “*State capture: Top law firm linked to Transnet ‘bribery’ scandal*” that appeared in the City Press newspaper, dated 05 January 2020 and “*the subsequent Ombudsman ruling in respect of corruption.*”

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

- 3.1 The Public Protector is an independent constitutional institution established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.
- 3.2 Section 182(1) of the Constitution provides that:

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

- (a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;*
- (b) to report on that conduct; and*
- (c) to take appropriate remedial action.”*

- 3.3 Section 182(2) directs that the Public Protector has the additional powers and functions prescribed by national legislation. The Public Protector's powers are regulated and amplified by the Public Protector Act which states, amongst others, that the Public Protector has the powers to investigate and redress maladministration and related improprieties in the conduct of state affairs.
- 3.4 Section 6(4)(c)(ii) of the Public Protector Act provides that the Public Protector "*shall be competent at any time prior to, during or after an investigation, **if she or she deems it advisable**, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it, or to make an appropriate recommendation regarding the redress of the prejudice resulting from or **make any other appropriate recommendation he or she deems expedient to the affected public body or authority.***" (own emphasis)
- 3.5 Section 6(4)(b) of the Public Protector Act further confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.
- 3.6 Transnet is an organ of the state as contemplated in section 239 of the Constitution and therefore the Public Protector is competent to investigate the affairs of Transnet and the alleged conduct of Dr Molefe, in his capacity as the chairperson of the Transnet Board, as envisaged in section 182(1) of the Constitution, read with section 6(5) of the Public Protector Act. The jurisdiction of the Public Protector was not contested in this instance.
- 3.7 The Popo Molefe Foundation is a Charitable Trust established as a non-profit organisation to advance the educational aspirations of disadvantaged youth whose destitution limits their ability to acquire tertiary education in selected disciplines. The Popo Molefe Foundation also supports youth development in sport and promotes the rehabilitation and integration into

society of young people who have found themselves on the wrong side of the law. The Foundation is managed by an independent Board of Trustees which was established and registered in 1998. Dr Molefe is one of the trustees and the Chairman of the Board.

- 3.8 Section 182(1) of the Constitution limits the scope of the Public Protector's mandate and powers to state affairs and affairs of the public administration, which excludes the affairs of the Popo Molefe Foundation.

4. ISSUES IDENTIFIED FOR INVESTIGATION

- 4.1 Based on the analysis of the complaint, the following issues were identified to inform and focus the investigation:

- 4.1.1 Whether Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by Mncedisi Ndlovu & Sedumedi Attorneys, a service provider to Transnet, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and in terms of section 6(5)(b) of the Public Protector Act; and
- 4.1.2 Whether Transnet SOC Ltd failed to investigate allegations of corruption against Dr Popo Molefe in terms of clause 5.3 of the Transnet Ethics Code, in relation to the payment of R350 000 to the Popo Molefe Foundation Charitable Trust by MNS Attorneys, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act.

5. THE INVESTIGATION

5.1 Methodology

5.1.1 The investigation is conducted in terms of section 182 of the Constitution read with sections 6 and 7 of the Public Protector Act.

5.1.2 The Public Protector Act confers on the Public Protector, the sole discretion to determine how to investigate with due regard to the circumstances of each case.

5.2 Approach to the Investigation

5.2.1 The approach to the investigation included the exchange of documents, analysis of the relevant documentation and consideration and application of the relevant laws, regulatory framework and prescripts.

5.2.2 The investigation was approached using an enquiry process that seeks to determine:

- (a) What happened?
- (b) What should have happened?
- (c) Is there a discrepancy between what happened and what should have happened and does that deviation amount to improper conduct or maladministration?
- (d) In the event of a violation, what action should be taken?

5.2.3 The question regarding what happened is resolved through a factual enquiry, relying on the evidence provided by the parties and independently sourced during the investigation. Evidence is evaluated and a determination is made on what happened based on a balance of probabilities. In this case,

the factual enquiry principally focused on whether the alleged conduct of the Dr Molefe and Transnet were inconsistent with the applicable prescripts.

- 5.2.4 The enquiry regarding what should have happened, focuses on the law and/or rules that regulate the standards that should have been met by the functionaries of Transnet in relation to the subject of the complaint.
- 5.2.5 Notably, the Complainant lodged her complaint with the Public Protector through a letter dated 15 November 2020, in terms of section 4(1) of the Executive Members' Ethics Act, 1998 (EMEA).
- 5.2.6 Through a letter dated 21 April 2021, the Public Protector advised the Complainant that in terms of section 2(1) of EMEA, the Public Protector can only investigate allegations of a breach of the Executive Ethics Code, 2000 (Executive Ethics Code) by Cabinet members, Deputy Ministers and Members of Executive Council (MECs) and that Dr Molefe does not belong to any of the aforementioned categories.
- 5.2.7 The Complainant was also advised that notwithstanding the above, the complaint would be investigated in accordance with the provisions of the Public Protector Act and not in terms of EMEA. The Complainant did not respond to the above-mentioned letter.
- 5.2.8 Regarding the request for the Public Protector to investigate the allegations of corruption as published in the City Press newspaper, dated 05 January 2020, the Complainant was requested to clarify specific allegations that she wanted the Public Protector to pursue in accordance with section 6(1) of the Public Protector Act, read with Rule 5(3) of *Rules Relating to Investigations*

by the Public Protector and Matters Incidental thereto, 2018, as amended¹. She was further requested to provide clarity on what her allegations were in respect of the “Ombudsman’s ruling”.

5.2.9 Despite numerous follow-up requests, no response or further submissions were made by the Complainant regarding the issues raised with her, therefore no issues for investigation could be determined and investigated on these aspects.

5.2.10 Consequently, the Public Protector focussed the investigation on the issues that fall within the ambit of section 6(5) of the Public Protector Act, as highlighted in paragraph 4.1 above.

5.3 Key sources of information

5.3.1 Documents and Correspondence

- 5.3.1.1 Minutes of Transnet Special Board Meeting, dated 07 February 2018;
- 5.3.1.2 Letter of appointment of Dr Molefe as Board Member, dated 14 May 2018;
- 5.3.1.3 Declaration of Interests Form of Dr Molefe, dated 11 June 2018;
- 5.3.1.4 Donation/ Sponsorship advertisement, Undated [2019];
- 5.3.1.5 Declaration of Interests Form of Dr Molefe, dated 25 March 2019;
- 5.3.1.6 Media Statement by Transnet Chairperson, dated 30 July 2019;
- 5.3.1.7 Legal Outsourcing Documents, dated 2019 - 2020;
- 5.3.1.8 Parliamentary question number 1890 and reply, undated;
- 5.3.1.9 Popo Molefe Foundation Trust Deeds of Amendment, dated 18 June 2020;
- 5.3.1.10 Declaration of Interests Form of Dr Molefe, dated 25 July 2020;
- 5.3.1.11 Complaint letter from the Complainant, dated 15 November 2020;

¹ Published under Government notice No 945, Government Gazette 41903 of 14 September 2018 and amended in Government Notice No 1047, Government Gazette 43758 dated 2 October 2020.

Report of the Public Protector

- 5.3.1.12 Letter from the Investigation Team to the Complainant, requesting clarity and/or further particulars regarding the complaint, dated 21 April 2021;
- 5.3.1.13 Letter from the Investigation Team to Transnet, requesting Transnet to respond to the allegations, dated 04 May 2021;
- 5.3.1.14 Letter from Ms Portia Derby, the erstwhile Group Chief Executive of Transnet (Ms Derby), responding to the allegations, dated 06 June 2021;
- 5.3.1.15 Letter from the Investigation Team to Transnet, requesting further information regarding the complaint, dated 20 July 2021;
- 5.3.1.16 Letter from the Public Protector to Dr Molefe, requesting him to respond to the allegations, dated 27 July 2021;
- 5.3.1.17 Letter from Dr Molefe to the Public Protector, responding to the Complainant's allegations, dated 03 September 2021;
- 5.3.1.18 Letter from Ms Portia Derby to the Public Protector, providing further information regarding the investigation, dated 04 September 2021;
- 5.3.1.19 Letter from the Investigation Team to MNS Attorneys, requesting submission of information relating to the investigation, dated 26 January 2022;
- 5.3.1.20 Letter from MNS Attorneys to the Public Protector, responding to the issues raised by the Investigation Team, dated 28 February 2022;
- 5.3.1.21 Letter from the Investigation Team to Ms Derby, requesting Transnet to provide documents showing allocation of work to the panel of attorneys, dated 27 April 2022;
- 5.3.1.22 Letter from the Investigation Team to Harris Nupen Molebatsi (HNM Attorneys), requesting supplementation to Dr Molefe's previous submission, dated 27 April 2022;
- 5.3.1.23 Letter from Mr Stanley Mamaregane (Mr Mamaregane), General Litigation: Transnet, to the Investigation Team, providing details regarding Transnet panel of attorneys, dated 09 May 2022;
- 5.3.1.24 Letter from HNM Attorneys to the Investigation Team, providing further information as requested, dated 11 May 2022;
- 5.3.1.25 Email from Investigation Team to Mr Mamaregane, requesting legal outsourcing reports, dated 18 August 2022;

Report of the Public Protector

- 5.3.1.26 Letter from Mr Mamaregane to the Investigation Team, enclosing outsourcing legal reports, dated 08 September 2022;
- 5.3.1.27 Email from Investigation Team to Mr Mamaregane, requesting further information regarding the audit report, dated 07 November 2022;
- 5.3.1.28 Email from Mr Mamaregane to the Investigation Team, providing further information regarding the appointment of MNS Attorneys and enclosing an extract of AGSA, dated 08 November 2022;
- 5.3.1.29 Letter from the Investigation Team to Dr Molefe, requesting *inter alia* a copy of minutes/resolution concerning referred to in Dr Molefe's response, dated 30 January 2023;
- 5.3.1.30 Letter from HNM Attorneys to the Investigation Team, providing further information and enclosing copy of minutes requested, dated 22 February 2023;
- 5.3.1.31 Letter from the Investigation Team to Ms Shokie Bopape (Ms Bopape), the Secretary of the Transnet Board and Mr Mamaregane, requesting an explanatory note on some of the provisions in the Transnet Ethics Code and how it is implemented, dated 02 November 2023;
- 5.3.1.32 Letter from Mr Mamaregane to Investigation Team, providing an explanatory note on Transnet Ethics Code and enclosing a document titled *Trannset Investigations and FRM Standard Operating Procedure* (Investigation SOP), dated 29 November 2023;
- 5.3.1.33 Letter from the Investigation Team to Ms Bopape, requesting clarity regarding paragraph 4 of the Investigation SOP dated 01 December 2023;
- 5.3.1.34 Letter from Ms Bopape to Investigation Team, providing an explanatory note on Transnet Ethics Code and comment on paragraph 4 of Investigation SOP, dated 08 December 2023;
- 5.3.1.35 Email from Investigation Team to Ms Bopape, requesting a copy of the latest Transnet Ethics Code, dated 27 February 2024;
- 5.3.1.36 Email from Mr Kgaukgelo Makhura of Transnet to the Investigation Team, enclosing a copy of the document titled "*Transnet Code of Ethics Commitment Statement,*" dated 28 February 2024;

5.3.2 Legal framework

- 5.3.2.1 Public Protector Act, 1994;
- 5.3.2.2 Constitution of the Republic of South Africa, 1996;
- 5.3.2.3 Gifts and Hospitality Policy of 14 September 2014;
- 5.3.2.4 Transnet Code of Ethics Policy of 27 August 2015;
- 5.3.2.5 Transnet Legal Policy of 11 April 2016;
- 5.3.2.6 Declaration of Interest and Related Party Disclosures Policy for Non-Executive Director of 27 August 2015;
- 5.3.2.7 Declaration of Interest and Related Party Disclosures Policy for Non-Executive Director of 30 March 2021;
- 5.3.2.8 Transnet Investigations and FRM Standard Operating Procedure of 19 April 2021;
- 5.3.2.9 Anti-Fraud and Corruption Policy of 28 September 2021; and
- 5.3.2.10 Transnet Code of Ethics Commitment Statement of 31 May 2023;

5.3.3 Case Law

- 5.3.3.1 *Public Protector and Others v President of the Republic of South Africa and Others* (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021);
- 5.3.3.2 *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another* 2015 (6) SA 338 (WCC) (4 August 2015);
- 5.3.3.3 *Browns the Diamond Store v Commission for Conciliation, Mediation and Arbitration and Others* (JR1172/14) [2016] ZALCJHB 187 (13 May 2016);
- 5.3.3.4 *Scheepers v Transnet Bargaining Council and Others*, (JR1818/20) [2023] ZALCJHB 85 (28 March 2023);
- 5.3.3.5 *Phillips v Fieldstone Africa (Pty) Ltd* (2004) 25 ILJ 1005 (SCA); and
- 5.3.3.6 *The Movie Camera Company (Pty) Ltd v Van Wyk and another* [2003] 2 All SA 291 (C);

5.3.4 Notices issued in terms of section 7(9)(a) of the Public Protector Act

5.3.4.1 Section 7(9)(a) of the Public Protector Act, provides that persons implicated in an investigation by the Public Protector, are to be afforded an opportunity to make representations regarding same.

(a) On 20 May 2024, section 7(9)(a) Notices were electronically transmitted in accordance with Rule 8(1)(d) of the Public Protector Rules to the following persons to afford them an opportunity to make representations regarding the preliminary findings and recommendations, Dr Molefe, Mr Pravin Gordhan, MP (Mr Gordhan), former Minister of Public Enterprises, Mr Andile Sangqu (Mr Sangqu), the chairperson of the Transnet Board, and Ms Michelle Phillips (Ms Phillips), the Group Executive of Transnet; and

(b) On 21 May 2024, the Complainant was also furnished with a section 7(9) Notice.

5.3.4.2 The Public Protector received responses to the section 7(9) Notice from Mr Gordhan, HNM Attorneys on behalf of Dr Molefe, and Ms Phillips on behalf of Transnet on 30 May 2024, 04 June 2024 and 10 June 2024, respectively.

5.3.4.3 The Public Protector did not receive any acknowledgement or substantive response from the Complainant.

6. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

6.1 Whether Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by Mncedisi Ndlovu & Sedumedi Attorneys, a service provider to Transnet, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and in terms of section 6(5)(b) of the Public Protector Act

Common cause

6.1.1 Dr Molefe is the founder and trustee of the Popo Molefe Foundation, which is registered with the Department of Social Development as a non-profit organisation and with the Master of the High Court on 29 April 1998, under trust number (IT:37.../19...T).

6.1.2 On 14 May 2018, Dr Molefe was appointed by Mr Gordhan as the Chairperson of the Transnet Board, he is no longer a member of the Transnet Board, due to his resignation in October 2023.

6.1.3 Mr Sangqu was appointed as the new Chairperson of the Transnet Board on 12 July 2023.

6.1.4 MNS Attorneys was appointed onto Transnet's legal panel through a procurement process during 2017. The panel was appointed for a period of three (03) years.

- 6.1.5 On 04 April 2019, MNS Attorneys in response to an invitation to sponsors and donors, purchased a Gold Package Sponsorship from the Popo Molefe Foundation Charity Golf Fundraiser Event in the amount of R350 000.
- 6.1.6 MNS Attorneys was not the only recipient of this request. A number of companies and individuals were approached with a similar request by virtue of an open invitation to either make a donation to the Foundation or to purchase one of four (04) sponsorship packages for the Foundation's Charity Golf Day and Gala Dinner, set to take place from 31 May to 01 June 2019. Dr Molefe, in his capacity as the Founder and Chairperson of the Popo Molefe Foundation, signed the invitation.
- 6.1.7 The event was open to various companies and individuals to support the charitable initiatives of the Foundation, which entitled the sponsors/donors to, *inter alia*, be recognised and listed on the various branding platforms that the Foundation employed. This included, amongst others, being publicly mentioned at the Gala Dinner and listed on the Foundation's website for the contribution made to the Trust, in the 2019 fund raising programme.

Issue in dispute

- 6.1.8 The issue for the Public Protector's determination is whether Dr Molefe contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package of R350 000 by MNS Attorneys who were on the Transnet panel of attorneys, while he was the Chairperson of the Transnet Board.

The Complainant's version

- 6.1.9 The payment of R350 000 made to the Popo Molefe Foundation by MNS Attorneys was in contravention of clause 11.2.2 of the Transnet Ethics

Code, which prohibits the non-executive directors from using their position of authority and/or facilities provided by Transnet to further personal interests or that of friends and relatives, as Dr Molefe was a sitting Chairperson of the Transnet Board during the payment in question.

6.1.10 The Complainant questioned whether the payment by MNS Attorneys to the Popo Molefe Foundation, did not affect or unduly influence Dr Molefe's independence and his relationship with MNS Attorneys, as a service provider to Transnet.

6.1.11 The Complainant further questioned whether the payment in question was due to a corrupt relationship between Dr Molefe and MNS Attorneys or any of its officials.

Dr Molefe's version

6.1.12 The Public Protector, through a letter dated 27 July 2021, requested Dr Molefe to respond to the allegations proffered against him by the Complainant. In his response letter to the Public Protector, dated 03 September 2021, Dr Molefe stated that:

6.1.12.1 He was first appointed as the Interim and Non-Executive Chairman of the Transnet Board, together with the Interim Board. The period was also occasioned by the appointment of other members of the new Transnet Board;

6.1.12.2 He was advised that Transnet appointed MNS Attorneys to the panel of approved firms of attorneys to provide legal services on or about 01 September 2017. This predated his appointment as the Chairperson of the Transnet Board;

6.1.12.3 There was no corrupt relationship between the Popo Molefe Foundation and MNS Attorneys or its officials;

6.1.12.4 The Trust is created for charitable purposes and in terms of clause 2 of the Amended Trust Deed of the Popo Molefe Foundation, dated 01 December 2015 (Trust Deed), its resources are solely and exclusively applied in the furtherance of its objectives which are to:

- (a) Create a trust for the benefit of beneficiaries;
- (b) Be a non-profit public organisation exclusively for charitable purposes;
- (c) Generally, focus on the plight of youth in need and in particular the needs of the beneficiaries;
- (d) The trustees are required to preserve, maintain, increase and/or administer:
 - (i) The assets of the trust for the benefit of the beneficiaries; and
 - (ii) The assets and income for the immediate and/or ultimate benefit of the beneficiaries.

6.1.12.5 The Trust does not form part of the estate of the trustees except insofar as the trustee is a beneficiary, of which he was not. Clause 23 of the Trust Deed, specifically states that:

“Notwithstanding anything to the contrary herein expressed or implied, no discretion or power conferred upon the Trustees or any other person by this deed or by any rule of law or arising in consequence of the exercise of any power conferred upon the Trustees by this trust deed, shall be exercised, and nothing in this trust deed operates, so as to cause or permit part of the capital of the trust to be or become payable to or applicable directly or indirectly for the benefit of the Founder or his estate.” (His emphasis);

- 6.1.12.6 The Trust is independently audited, operates within the confines of the South African laws and advances its objectives, as indicated above;
- 6.1.12.7 The Trust is controlled by the board of trustees, who are professional, who understand the legal nature of a trust and the purpose for which trust funds are to be expended. In 2019, the Trust had six (06) trustees and they all participated in its affairs and decision-making processes;
- 6.1.12.8 In terms of the Trust Deed, decisions of the trustees are by way of majority vote. As such, the decision to address the invitation to the sponsors was a decision of the trustees, because no one trustee has the authority to make decisions on behalf of the Trust;
- 6.1.12.9 In terms of the Trust Deed, trustees and their families are excluded from the Trust, because this would be in conflict with the terms and conditions of its registration;
- 6.1.12.10 In 2019, in his capacity as Founder and Chairperson of the Popo Molefe Foundation, he signed a letter inviting various companies, including MNS Attorneys, along with other sponsors, to take up one of the available sponsorship packages;
- 6.1.12.11 During April 2019, MNS Attorneys purchased a Gold Package Sponsorship at the cost of R350 000 from the Popo Molefe Foundation along with other sponsors;
- 6.1.12.12 The proceeds raised from the golf event were utilised in accordance with the objectives of the Trust as referred to above. *“Therefore, it is evident that the relationship between the Foundation and MNS Attorneys was at arms’ length and characterised by MNS Attorneys’ once off sponsorship towards the charity golf event”*;

- 6.1.12.13 He did not derive any financial benefit from the sponsorship made by MNS Attorneys. He also did not specifically declare the donation to Transnet, because it was paid directly to the Popo Molefe Foundation. However, in the document titled “*TRANSNET SOC LTD-DECLARATION OF INTEREST IN CONTRACTS-2019*” dated 25 March 2019, he declared that he was a trustee of the Trust; and
- 6.1.12.14 He was not aware of a clause or provision of Transnet’s Gift and Hospitality Policy, 2014 (Gifts Policy), which he or the Popo Molefe Foundation had to consider before accepting donations from MNS Attorneys.
- 6.1.13 Regarding the role played by the new Transnet Board in the appointment of MNS Attorneys to investigate the allegations of irregularities in the procurement of the 1064 locomotives tender by Transnet (Locomotives Investigation), Dr Molefe referred to the minutes of a special board meeting of the previous Transnet Board, held on 07 February 2018, which resolved that an independent forensic auditor be appointed to finalise the outstanding items in the Werksmans Attorneys’ scope of work.
- 6.1.14 Dr Molefe submitted that following a presentation by MNS Attorneys and Werksmans Attorneys on 13 June 2018, the new Transnet Board resolved that MNS Attorneys should complete the Investigation and advise Transnet accordingly. He further indicated that Transnet’s legal department was instructed to execute the resolution of the new Transnet Board.

Request for further information

- 6.1.15 The Public Protector wrote a letter, dated 27 April 2022, to HNM Attorneys, who are the legal representatives of Dr Molefe and the Popo Molefe Foundation, requesting confirmation of the payment received from MNS Attorneys.

- 6.1.16 In a response letter to the Public Protector, dated 11 May 2022, HNM Attorneys confirmed that on 04 April 2019, the Popo Molefe Foundation received a payment of R350 000 from MNS Attorneys. In turn, the Popo Molefe Foundation issued MNS Attorneys with an invoice confirming receipt of funds, dated 08 April 2019.
- 6.1.17 On 30 January 2023, the Public Protector requested Dr Molefe to provide minutes and/or Transnet Board's resolution of 13 June 2018.
- 6.1.18 In its response letter dated 22 February 2023, HNM Attorneys provided copies of the requested minutes. HNM Attorneys further referred to information received from Transnet which indicated that *"It appears from the agenda of the Board meeting of 13 June 2018 that MNS was one of the discussion points (item 5 of the agenda). From the reading of the minutes of 13 June 2018 it appears that MNS discussion took place in the closed session of the Board. The minutes do not reflect the discussion other than to indicate that management (including the Company Secretariat) was excused from the meeting..."*

Letter from MNS Attorneys to the Popo Molefe Foundation, dated 04 April 2019

- 6.1.19 HNM also furnished a copy of letter from MNS Attorneys addressed to Ms Refiloe Mollo (Ms Mollo) of the Popo Molefe Foundation titled *"Popo Molefe Foundation Charity Golf Day,"* dated 04 April 2019. The letter recorded *inter alia* that:

"We are delighted to advise that MNS has resolved to sponsor the Charity Golf Day. To this end, we are taking up the gold package sponsorship.

The amount to R350 000.00 has been paid into your nominated banking account².”

Submission from the erstwhile GCE, Ms Portia Derby

- 6.1.20 The Public Protector, through a letter dated 04 May 2021, wrote to Ms Derby, requesting her to respond to the allegations raised by the Complainant. Responses were received from Ms Derby, through letters dated 30 June 2021 and 04 September 2021, respectively. Ms Derby submitted that:
- 6.1.20.1 The payment of R350 000 made by MNS Attorneys to the Popo Molefe Foundation was not made in contravention of clause 11.2.2 of the Transnet Ethics Code³, adopted by the Transnet Board on 27 August 2015;
- 6.1.20.2 Dr Molefe has since his appointment as the chairperson of the Transnet Board, declared his role in the Popo Molefe Foundation. Ms Derby provided copies of the Declaration of Interests (DOI) forms made in 2018, 2019, 2020 and 2021, respectively;
- 6.1.20.3 Transnet had no evidence to suggest that the payment in question furthered the personal interests of Dr Molefe or that of his friends or relatives. Further that Transnet was not involved with the Popo Molefe Foundation;
- 6.1.20.4 The payment in question did not affect Dr Molefe’s independence and his relationship with MNS Attorneys as a service provider to Transnet. There was no evidence to suggest that the payment in question demonstrates a corrupt relationship; and

² The proof of payment bore the account name of “*Popo Molefe Foundation*.”

³ The said Code prohibits directors from “*using a position of authority and/or facilities provided by Transnet to further personal interest or that of friends or relatives.*”

6.1.20.5 MNS Attorneys were appointed by the previous Transnet Board to conduct a further investigation into the 1064 locomotive tender.

Documents submitted by Ms Derby

Minutes of the Special Board of Directors Meeting held on 07 February 2018

6.1.21 Ms Derby provided a copy of the minutes titled “*MINUTES OF THE SPECIAL BOARD OF DIRECTORS MEETING (CLOSED SESSION) NO. 10-17/18FY HELD ON 07 FEBRUARY 2018 13:50 IN BOARDROOM 4902, 49TH FLOOR, CARLTON CENTRE, 150 COMMISSIONER STREET, JOHANNESBURG*” (the Minutes).

6.1.22 In terms of the Minutes, the meeting of the Transnet Board was attended by the following members:

No.	Names of members present	Designation
1.	Ms LC Mabaso	Chairperson
2.	Ms Y Forbes	Non-Executive Director
3.	Mr GJ Mahlalela	Non-Executive Director
4.	Ms PEB Mathakga	Non-Executive Director
5.	Mr ZA Nagdee	Non-Executive Director
6.	Mr VM Nkonyane	Non-Executive Director
7.	Mr SM Radebe	Non-Executive Director
8.	Mr N Silinga	Chief Legal Counsel
9.	Ms NE Khumalo	Group Company Secretary

6.1.23 It was recorded in the Minutes that there was partial attendance of the meeting by the former GCE, Mr SI Gama, and the former Chief Financial Officer, Mr GJ Pita.

- 6.1.24 One of the resolutions recorded in the Minutes of the meeting was that “*the Board noted that due to the inconclusive nature of the Werksmans Report as a result of limitations expressed in it, the Board agreed to commission an independent forensic auditor to outstanding items in the Werksmans scope.*”
(sic)

Excerpt from the Resolution of meeting held on 16 February 2018

- 6.1.25 In the “EXCERPT FROM THE RESOLUTION OF THE 1064 LOCOMOTIVES BOARD STEERING COMMITTEE (“STEERCOM”) MEETING HELD BY TELECONFERENCE ON 16 FEBRUARY 2018 AT 16:30” the resolutions were recorded as follows:

- (a) “*The Steering Committee recommended, to the Chairperson of the Board, the appointment of Mncedisi, Ndlovu & Sedumedi (MNS) Attorneys to conduct further investigation on the 1064 Locomotive Transaction.*”
- (b) “*A letter of authority should be issued to Supply Chain, on 19 February 2018.*”

Letter from former Transnet Chief Legal Counsel dated 20 July 2018

- 6.1.26 Ms Derby also provided a copy of a letter, dated 20 July 2018, from the former Transnet Chief Legal Counsel, Mr N Silinga, addressed to MNS Attorneys. The letter recorded, *inter alia*, that “*the newly appointed Board of Transnet (the Board) was informed by the Transnet Group CEO, Mr Gama, of your appointment to review the 1064 Locomotive Transaction (the Transaction).*”
- 6.1.27 Ms Derby further submitted that “*Instructions to the Transnet legal panel of attorneys are managed by the Chief Legal Officer and Heads of Legal at the*

Transnet Operating Divisions and Corporate Centre. The Transnet Board, including the Chairperson plays an oversight role in legal matters, but not in the appointment of the service providers”.

*Submission from Mr Stanley Mamaregane, Transnet General Manager:
Litigation*

- 6.1.28 Mr Mamaregane submitted a response, dated 09 May 2022, to the Public Protector’s further enquiry, dated 27 April 2022.
- 6.1.29 A copy of a list, containing one hundred and sixty-eight (168) firms of attorneys that were approved on the Transnet Panel of Attorneys between 2017 and 2021, including MNS Attorneys, was provided to the Investigation Team.
- 6.1.30 In his subsequent letter dated 08 September 2022, Mr Mamaregane stated that MNS Attorneys was part of the Transnet Panel of Attorneys for a period of three (03) years, effective from 01 September 2017 to 31 August 2020. However, due to delays in the procurement process of a new panel of attorneys, the contracts of the law firms in the 2017 panel were extended to 30 November 2021. Accordingly, MNS Attorneys’ contract with Transnet came to an end on 30 November 2021.
- 6.1.31 Mr Mamaregane further submitted that the decision-making process to outsource legal services, has always been that of the head of the Legal Department or a Legal Advisor being the only persons authorised to instruct an external legal practitioner to render legal services on behalf of Transnet. He stated that to this end, the Transnet Board is not authorised or does not get involved in the approval process for the outsourcing of legal services.
- 6.1.32 He also submitted a copy of the Transnet legal outsourcing documents which indicate that on 01 February 2019, MNS Attorneys was appointed to

conduct an “*Investigation into Allegations of Irregularities: Manganese Export Capacity Allocation*” (Manganese Investigation).

- 6.1.33 In his email dated 08 November 2022, Mr Mamaregane stated that the previous Transnet Board, chaired by Ms Linda Mabaso, resolved in February 2018 to appoint MNS Attorneys, to conduct a forensic investigation into the outstanding items from an investigation by Werksmans Attorneys, relating to allegations of irregularities in the procurement of 1064 diesel and electric locomotives by Transnet.
- 6.1.34 He also indicated that Transnet’s external Auditors, Sizwe Ntsaluba Gobodo (representing the Auditor General), came to the conclusion that the appointment of MNS Attorneys was irregular on the grounds that Transnet had failed to produce evidence or records of the selection process or criteria which the Board had followed. However, the said appointment of MNS Attorneys by the then Transnet Board was in no way connected to the Board that was headed by Dr Molefe.

Further submission from Mr Stanley Mamaregane, Transnet General Manager: Litigation

- 6.1.35 Through a letter dated 02 November 2023, the Public Protector requested Transnet to indicate if the Board was involved in the decision to award the Manganese Investigation to MNS Attorneys.
- 6.1.36 In his response dated 29 November 2023, Mr Mamaregane reported that the Manganese Investigation never served before the Transnet Board and thus there would not be any minutes of the Board recording any such discussion. He further indicated that the investigation was overseen by the Chief Legal Counsel at the time together with Group Forensics, who would have reported to the Acting Group Chief Executive at the time, Mr Mohammed Mahomedy.

Submissions from the Secretary of the Transnet Board, Ms Shokie Bopape

- 6.1.37 The Public Protector, through a letter dated 01 December 2023, requested the Secretary of the Board, Ms Shokie Bopape (Ms Bopape), to confirm if the Manganese Investigation ever served before the Transnet Board. In her response dated 08 December 2023, Ms Bopape reported that the appointment of MNS Attorneys to conduct the said investigation was not discussed and/ or approved by the Transnet Board.

Response by Mncedisi, Ndlovu & Sedumedi Attorneys

- 6.1.38 The Public Protector, through a letter dated 26 January 2022, requested MNS Attorneys to comment on the Complainant's allegations made against Dr Molefe.
- 6.1.39 In its response letter dated 28 February 2022, MNS Attorneys submitted that:
- 6.1.39.1 MNS Attorneys received an invitation from the Popo Molefe Foundation to purchase a sponsorship package in respect of its annual two-day golf and gala dinner event;
- 6.1.39.2 The donation made to the Popo Molefe Foundation was not for the personal benefit of Dr Molefe, but rather for the benefit of the Popo Molefe Foundation and its targeted beneficiaries;
- 6.1.39.3 MNS Attorneys has not made any other donations to the Popo Molefe Foundation;
- 6.1.39.4 Dr Molefe, as Chairman of the Transnet Board, does not get involved in the day-to-day operations of Transnet as all engagements with attorneys are managed by the Group Chief Legal Counsel;

6.1.39.5 The legal assistance offered to Dr Molefe was in respect of the following matters:

- “(i) his appearance at the Commission of Inquiry into allegations of State capture maladministration and corruption (“the Commission”) in respect of matters that occurred during his tenure as Chairman of the Board of directors of Passenger Rail Agency of South Africa;*
- (ii) defamation high court action proceedings against Mr Muzi Khuzwayo; and*
- (iii) with regard to the legal representation at the commission, you will note that the mandate was that of Passenger Rail Agency of South Africa and not Transnet. Thus, a conflict of interest does not arise in such circumstances.”*

6.1.39.6 MNS Attorneys was no longer on the new Transnet Panel of Attorneys that was finalised towards the end of 2021.

Response to the section 7(9)(a) Notice

6.1.40 On 20 May 2024, the Investigation Team electronically transmitted section 7(9) Notices to Mr Gordhan, Dr Molefe, Mr Sangqu and Ms Phillips affording them an opportunity to make representations regarding the intended findings and recommendations of the Public Protector.

Response from Mr Pravin Gordhan, MP

6.1.41 On 30 May 2024, Mr Gordhan noted the proposed recommendations as contained the section 7(9) Notice and undertook to ensure that the Transnet Board implements the commendations upon receipt of the final report.

Response from Dr Popo Molefe

- 6.1.42 On 04 June 2024, HNM Attorneys, on behalf of Dr Molefe, advised that in light of the preliminary findings contained in the section 7(9) Notice under the first issue, Dr Molefe would not be making further submissions with regard to the matter.

Applicable law

Public Protector Act, 1994

- 6.1.43 Section 6(5)(c) of the Public Protector Act provides that the Public Protector is competent to investigate any alleged *“improper or unlawful enrichment or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in connection with the affairs of an institution or entity contemplated in paragraph (a)”*.

Transnet Ethics Code, 2015

- 6.1.44 Clause 4 of the Transnet Ethics Code⁴ provides that:

“This Code sets out a code of conduct that requires employees and Non-executive directors to observe a high standard of business and personal ethics in the conduct of their duties and responsibilities. It is critical that employees and Non-executive directors demonstrate honesty and integrity in fulfilling their responsibilities and comply with all applicable policies, laws and regulations. It is the responsibility of all the employees and Non-executive directors⁵ to report violations of this code.”

⁴ Adopted by the Transnet Board on 27 August 2015.

⁵ Clause 7.4 of the Transnet Ethics Code defines a non-executive director as *“a director (Board Member) who is not a salaried employee of the Company.”*

6.1.45 Clause 8 of the Transnet Ethics Code stipulates that, “*The Code will apply to all Transnet employees, including permanent and non–permanent employees, **Non-executive directors** as well as service providers, suppliers and trade partners of Transnet.*” (Added emphasis)

6.1.46 Clause 11 of the Transnet Ethics Code deals with the ethical behaviour and values and provides as follows:

11.2 “*Acting with integrity and professionalism at all times:*

11.2.1 ...; and

11.2.2 ***Refraining from using a position of authority and/or facilities provided by Transnet to further personal interests or that of friends and relatives.***”(Added emphasis)

The Companies Act, 2008 (as amended)

6.1.47 Section 75(4) of the Companies Act⁶ provides that “*At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.*”

6.1.48 Section 75 of the Companies Act should be read with the definition of personal financial interest contained in section 1 of the Act. The provision states that:

⁶ 71 of 2008, as amended.

“Personal financial interest, when used with respect to any person: (a) means a direct material interest of that person of a financial, monetary or economic nature or to which a monetary value may be attributed...”

Declaration of Interest and Related Party Disclosures Policy for Non-Executive Directors, 2015

6.1.49 Clause 5.4 of the Disclosures Policy stipulates that:

“In terms of section 75 of the Companies Act, a Director may disclose any Personal Financial Interest in advance, by submitting a Declaration of Interest Form to the Board of Transnet, setting out the nature and extent of that interest, to be used generally until changed or withdrawn by further notice from that Director”.

6.1.50 The Disclosures Policy further sets out the obligations applicable to a director serving at the Transnet Board. Clause 4.2 of the Disclosures Policy defines conflict of interest as a situation in which, amongst others:

4.2.1 a Director has a Personal Financial Interest;

4.2.2 a Director has a private interest or personal considerations or has an Affiliation or Relationship which affects, or may affect, or may be perceived to affect a Director’s judgment in acting in the best interest of the Company, or could corrupt the Director’s motivation for acting in a particular manner or which could result in, or be perceived as Favouritism or Nepotism.

4.2.3 A Director uses his /her position, or privileges, or information obtained while acting in the capacity as a Director for:

4.2.3.1 Personal gain, or advancement, or any other advantages; or

4.2.3.2 The expectation of personal gain, or advancement, or any other advantage, accruing to the Director or any member of his family, or friends or business associates.”

6.1.51 Clause 5.3.6 of the Disclosures Policy requires a director to disclose:

5.3.6.1 *“conflicts of interest (whether real or perceived) in good time together with full details to the board of Transnet and such conflicts should be appropriately managed”, any interest in a contract with Transnet, or any personal financial interest in respect of a matter to be considered at a meeting of the Transnet Board;*

5.3.6.2 *Any interest in contract with Transnet;*

5.3.6.3 *Any direct or indirect personal or business interest that they have, or any spouse, partner or close family member may have in any matter before the Board of Transnet and, subject always to paragraph 5.5, must withdraw from the proceedings when that matter is being considered unless the Board of Transnet decides that the direct or indirect interest is trivial or irrelevant and the Director is not required to withdraw in accordance with paragraph 5.5; and*

5.3.6.4 *Any Personal Financial Interest in respect of a matter to be considered at a meeting of the Board of Transnet, and/or any matter in respect of which a Director knows that a related person has a Personal Financial Interest, in the manner set out in paragraph 5.5.”*

6.1.52 Clause 5.5 of the Disclosures Policy stipulates that, *“if a Director of Transnet has a personal Financial Interest in respect of matter to be considered at a meeting of the Board of Transnet, or knows that a related person has a Personal Financial Interest in the matter, the Director:*

5.5.1 *Must disclose the interest and its general nature in writing before the matter is considered at the meeting;*

5.5.2 *Must disclose to the meeting any material information relating to the matter, and known to the Director;*

- 5.5.3 *May disclose any observations or pertinent insights relating to the matter if required to do so by the other Directors;*
- 5.5.4 *If at the meeting, must recuse himself/herself from the meeting when the matter is being decided upon after making any disclosure contemplated in paragraphs 5.5.2 or 5.5.3;*
- 5.5.5 *Must not take part in the consideration of the matter, except to the extent contemplated in paragraphs 5.5.2 and 5.5.3;*
- 5.5.6 *...;*
- 5.7 *The onus is on the individual Directors to determine whether they are free from apparent or actual conflicts.”*
- 6.1.53 Clause 5.8.2 of the Disclosures Policy further requires a Director to disclose any direct or indirect interest in contracts or proposed contracts which have been or will be entered into by Transnet and all conflict of interest in accordance with the policy.

Gifts and Hospitality Policy, 2014

- 6.1.54 Clause 4 provides that, *“This policy is designed to regulate and control the acceptance and giving of gifts/invitations to hospitality events with external parties within the Transnet business environment.”*
- 6.1.55 Clauses 5 and 6 also deal with issues of *“conflict of interest”, “business courtesies”, “corruption” and “declaration of gifts”* amongst others.
- 6.1.56 Clause 9 defines employees as permanent employees, fixed-term contract employees, temporary employees and contracted service providers of Transnet.

- 6.1.57 Clause 15 of the Gift Policy stipulates that, “*This policy is applicable to all employees, including those employed on fixed term contracts, as well as customers and suppliers of Transnet.*”

Transnet Group Legal Policy, 2016

- 6.1.58 Paragraph 6.6.3 of the Legal Policy⁷ places the co-ordination and management of instructions to outside legal practitioners at the door of Group Legal.
- 6.1.59 Paragraph 6.12.1 of the Legal Policy stipulates that, “*All instructions to external legal practitioners must only be given by the in-house legal advisors, unless the Group Executive or Group Legal approves otherwise. This applies to all Transnet employees regardless of seniority.*”
- 6.1.60 Paragraph 6.12.1 of the Legal Policy stipulates that Transnet will only instruct external legal practitioners that are on the Transnet Legal Panel.

Case Law

- 6.1.61 In *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited and Another*⁸ the court stated that under common law, a director may not place herself in a position in which she has, or can have a personal interest, which conflicts or possibly conflicts with her duties to the company. Furthermore, the test regarding a conflict of interest rests upon the broad doctrine that a man, who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest (e.g. by making a profit) at that other’s expense. The court further

⁷ Approved on 11 April 2016.

⁸ 2015 (6) SA 338 (WCC) (4 August 2015) at para 20.

held that the common law principle of conflict of interest should be approached on a common sense basis.

- 6.1.62 In the matter of *Browns the Diamond Store v Commission for Conciliation, Mediation and Arbitration and Others*⁹ the court in referencing *Phillips v Fieldstone Africa (Pty) Ltd and another*¹⁰ held that a conflict of interest extends not only to actual conflicts of interest but also to those which are a real sensible possibility. Furthermore that:

*“However, the reference to a “possible conflict of interest” in Phillips’ case must be understood in the context in which it is used. It refers to a situation where a person owing a fiduciary duty to another, in this case an employer, actually does act in their own interest in circumstances in which their interest might possibly conflict with that of their principal, but does not disclose the possible conflict of interest to the person to whom the fiduciary duty is owed before embarking on such action, or does so without that person’s permission. **The breach of the fiduciary duty does not occur because of the mere existence of a possible conflict but how the potentially conflicted individual acts when that situation arises**” (Added emphasis).*

- 6.1.63 In *Scheepers v Transnet Bargaining Council and Others*,¹¹ (Scheepers) the Court held as follows:

*“The applicant transgressed in a manner that can be commonly described as constituting a conflict of interest or breach of his fiduciary duties towards the third respondent as his employer. These concepts are described in *National Union of Metalworkers of SA on Behalf of Nganezi and Others v**

⁹ (JR1172/14) [2016] ZALCJHB 187 (13 May 2016) at pages 33-34.

¹⁰ 2004(3) SA 459.

¹¹ (JR1818/20) [2023] ZALCJHB 85 (28 March 2023).

Dunlop Mixing & Technical Services (Pty) Ltd and Others (Casual Workers Advice Office as Amicus Curiae) at paragraph [21] as follows:

‘Fiduciary duties are duties that apply to persons who have access to, or power in relation to, the affairs of a beneficiary. These duties must be exercised for the sole purpose of promoting the beneficiary’s interests. The two core fiduciary duties are the no-conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits fiduciaries from obtaining any unauthorised profit for themselves that has not been properly disclosed or consented to by the beneficiary ...’

Applying these principles to the employment relationship, the Court then concluded¹²:

‘So despite the possibly confusing references to trust, confidence, loyalty and good faith in our case law it is clear that where contracting parties ‘are bound to promote the interest entrusted to their keeping ... [t]hey cannot take any advantage to themselves out of the business for which they have been appointed, nor derive any benefit therefrom, beyond such commission and charges as the law allows in the particular instance’. This essentially amounts to the duties that Idensohn identifies as distinctive of fiduciary duties: (a) that fiduciary duties require a unilateral obligation to act in the beneficiaries’ interest; (b) the primary fiduciary obligations are only two — no profit and no conflict of interest; and (c) fiduciary remedies are strict, with no intent required ...’ (Emphasis added).

6.1.64 The Court emphasised in *Phillips v Fieldstone Africa (Pty) Ltd*¹³ at para 27 that-

¹² At para 22.

¹³ (2004) 25 ILJ 1005 (SCA).

“... there is no magic in the term “fiduciary duty”. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship ...

The rule is a strict one which allows little room for exceptions ... It extends not only to actual conflicts of interest but also to those which are a real sensible possibility... The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice... Because the fiduciary who acquires for himself is deemed to have acquired for the trust, ...once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage... the fiduciary acted honestly and reasonably ...”

6.1.65 In the matter of *The Movie Camera Company (Pty) Ltd v Van Wyk and another*¹⁴ (*The Movie Camera*), that Court, in dealing with the concept of corporate opportunity, denoted that:

“It is clearly impossible and indeed unwise to lay down any conclusive guidelines which are to be applied in assessing whether or not one is dealing with a corporate opportunity which rightfully belongs to a company. A careful examination of all the relevant factors is necessary in order to arrive at a conclusion. However, the approach laid down by Laskin J in the Canadian Aerospace case (supra) at 391 may well serve as a very useful starting point.

“The general standards of loyalty, good faith and avoidance of a conflict of duty and self-interest to which the conduct of a director or senior officer must conform, must be tested in each case by many factors which it would be

¹⁴ [2003] 2 All SA 291 (C).

reckless to attempt to enumerate exhaustively. Among them are the factors of position or office held, the nature of the corporate opportunity, its ripeness, its specificity and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time in the continuation of fiduciary duty where the alleged breach occurs after termination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge"¹⁵

6.1.66 The Constitutional Court, in the matter of the *Public Protector and Others v President of the Republic of South Africa and Others*¹⁶ indicated that the provisions of the Executive Ethics Code dealing with conflict of interest appear not to be in line with EMEA. Section 2(1)(b) of the EMEA prescribes that the Code should prohibit members of the Executive from exposing themselves to a risk of conflict between their official responsibilities and their private interests. The Court also remarked that one way of avoiding this is for the member to recuse himself or herself from any matter where the member has a personal or private interest.¹⁷

6.1.67 In *Democratic Alliance and Another v Public Protector of South Africa and Others*¹⁸ (Democratic Alliance), Maya DCJ remarked that:

".... the risk must be real. This means the risk must not be imaginary, flimsy or far-fetched. What then is the standard? At the risk of sounding as if I am importing the test for bias, for the risk to be real, it must ... be of such a

¹⁵ At para 48.

¹⁶ (CCT 62/20) [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) (1 July 2021).

¹⁷ At para 22.

¹⁸ [2023] ZACC 25.

*nature that it would reasonably be apprehended by a reasonable person.”¹⁹
(Added emphasis)*

Articles and guides

6.1.68 In the article by the *Organisation for Economic Co-Operation and Development*²⁰ (OECD): *Managing Conflict of Interest in the Public Service*, 2003, a conflict of interest is defined as:

“Conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities”.

6.1.69 It is stated in the article that:

6.1.69.1 Defined in this way, *“conflict of interest”* has the same meaning as *“actual conflict of interest”*. A conflict of interest situation can therefore be current, or it may be found to have existed at some time in the past;

6.1.69.2 This can be contrasted with an *“apparent conflict of interest which can exist where it appears that a public official’s private interests could improperly influence the performance of their duties, but this is not in fact the case;”*

6.1.69.3 On the other hand, a *“potential conflict of interest”* arises where a public official has private interests which are such that a conflict of interest would

¹⁹ At para. 118.

²⁰ The OEC is a unique forum where governments of various democracies work together to address the economic, social and environmental challenges of globalisation. South Africa is a key member state to the OECD having joined on 16 May 2007. The OECD is also at the forefront of efforts to understand and help governments respond to new developments and concerns, such as corporate governance, managing conflict of interests and to seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

arise if the official were to become involved in relevant (i.e. conflicting), official responsibilities in the future;

- 6.1.69.4 Where a private interest has in fact compromised the proper performance of a public official's duties, that specific situation is better regarded as an instance of misconduct or "*abuse of office*", or even an instance of corruption, rather than as a "*conflict of interest*";
- 6.1.69.5 "*Private interests*" are not limited to financial or pecuniary interests, or those interests which generate a direct personal benefit to the public official. **A conflict of interest may involve otherwise legitimate private-capacity activity, personal affiliations, associations, and family interests, if those interests could reasonably be considered likely to improperly influence the officials' performance of their duties.** (Added emphasis)
- 6.1.69.6 A conflict of interest, if not managed properly, has the potential to undermine the proper functioning of democratic governments by:
- a) weakening adherence by public officials to the ideals of legitimacy, impartiality and fairness in public decision-making; and
 - (b) distorting the rule of law, the development and application of policy, the functioning of markets and the allocation of public resources.

Best Practice Guide CONFLICTS OF INTEREST of the Chartered Secretaries Southern Africa

- 6.1.70 The *Best Practice Guide CONFLICTS OF INTEREST of the Chartered Secretaries Southern Africa (CSSA)*²¹ highlights that perceived conflicts of

²¹ Prepared by Sabrina Paxton, Technical Adviser and the Technical Committee of the CSSA, November 2019.

interest are existing situations or relationships that reasonably could appear to other parties to involve a conflict of interest and exist in situations where an individual employee, a member of the individual's family, or a close personal relation, has financial interests, personal relationships, or associations with an external entity, individual or organisation, such that his or her activities within their own organisation could appear to be biased.

Corporate Governance Handbook: Principles and Practice

- 6.1.71 Hendrickse and Hefer-Hendrikse (2016:659) defines conflict of interest as *“any relationship that is or appears to be not in the best interest of the organisation and the Shareholders. A conflict of interest would prejudice an individual’s ability to perform his or her duties and responsibilities objectively. Arise where the same person or entity can act in more than one capacity”*.²²

King IV Report on Corporate Governance for South Africa, 2016

- 6.1.72 The King IV Report on Corporate Governance for South Africa, 2016²³ (King IV Report) states at page 47 the following regarding conflict of interests of directors of companies:

*“The personal interests of a director, or persons closely associated with the director, must not take precedence over those of the company and its shareowners. A director should avoid conflicts of interest, even when these could only be perceived as such. **Full and timely disclosure of any conflict, or potential conflict, must be made known to the board. Where***

²² Hendrickse JW & Hefer-Hendrikse, L. 2016 Corporate Governance Handbook: Principles and Practice. Cape Town: Juta.

²³ Institute of Directors of Southern Africa (IoDSA). King IV Report on Corporate Governance for South Africa 2016 [homepage on the Internet]. 2016. Available from: www.iodsa.co.za.

an actual or potential conflict does arise, on declaring their interest, a director can participate in the debate and/or vote on the matter but must give careful consideration to their own integrity in such circumstances and the potential consequences it may have for the board, company and themselves personally.” (Added emphasis)

Analysis

- 6.1.73 The evidence before the Public Protector reveals that in 2019, Dr Molefe, in his capacity as Founder and Chairperson of the Popo Molefe Foundation, signed an open letter, inviting various companies, along with other sponsors, to take up one of the available sponsorship packages.
- 6.1.74 The invitation was sent to the various prospective sponsors, including MNS Attorneys through the Popo Molefe Foundation. MNS Attorneys addressed a response to Ms Mollo of the Popo Molefe Foundation, advising that it had resolved to sponsor the charity golf day and had paid an amount of R350 000 into the nominated banking account. The response further attached the proof of payment.
- 6.1.75 The evidence before the Public Protector reflects that Dr Molefe already had a professional relationship with MNS Attorneys, in that he was legally represented by MNS Attorneys on various occasions prior to his appointment as the chairperson of the Transnet Board.
- 6.1.76 The evidence further indicates that MNS Attorneys was already on the panel of attorneys for Transnet from 01 September 2017 and had been allocated work, prior to Dr Molefe’s appointment to Transnet as the chairperson of the Board on 14 May 2018. There were further instructions given to MNS Attorneys during Dr Molefe’s tenure.

- 6.1.77 The ethical standard to which the conduct of Dr Molefe must conform to, in terms of clause 11.2.2 of the Transnet Ethics Code, must be tested by determining whether he acted as the Chairperson and a non-executive director of the Transnet Board, or in his personal capacity. Clause 11.2.2 of the Transnet Ethics Code enjoins a director to refrain from using their position of authority or Transnet's facilities to further their personal interests or that of friends and relatives.
- 6.1.78 There is no evidence to suggest that MNS Attorneys being contracted or receiving instructions was as a result of the purchase of the sponsorship, as it is clear that they were a service provider to Transnet before Dr Molefe's appointment.
- 6.1.79 The second leg of an enquiry into a possible transgression of clause 11.2.2 of the Transnet Ethics Code by Dr Molefe, focusses on the prohibition against using facilities provided by Transnet to further personal interests or that of friends or relatives.
- 6.1.80 From research conducted by the Investigation Team and jurisprudence as noted above, a director is expected to avoid using both tangible or physical as well as intangible company resources or assets for their own personal gain or benefit. This requirement is aimed at promoting transparency, fairness, and the proper use of company resources in the best interest of the company and its stakeholders.
- 6.1.81 The evidence before the Public Protector indicates that MNS Attorneys received an invitation to purchase a sponsorship from the Popo Molefe Foundation to which they responded. The event was hosted by the Popo Molefe Foundation at Sun City.

- 6.1.82 The final analysis of clause 11.2.2 of the Transnet Ethics Code considered the question whether the alleged use of authority and/or facilities was to further personal interests or that of relatives.
- 6.1.83 The Transnet Ethics Code does not define what personal interest is. However, in the OECD article, it is postulated that private or personal interests are not limited to financial, pecuniary or economic interests, or those interests which generate a direct personal benefit to a director.
- 6.1.84 It is not disputed that Dr Molefe has an interest in the Popo Molefe Foundation, being its Founder and Chairperson. He disclosed this personal interest to Transnet by completing the 2018, 2019 and 2020 DOI forms as required under clause 4.2 read with clause 5.3.6 of the Disclosures Policy.
- 6.1.85 The available evidence at the Public Protector's disposal is that the funds raised through the Golf Charity Event were for the benefit of the Popo Molefe Foundation's beneficiaries and not its trustees.
- 6.1.86 The evidence indicates that Dr Molefe is not a beneficiary of the Foundation. The Foundation is managed by an independent Board of Trustees which was established and registered in 1998. Dr Molefe is one of the trustees.
- 6.1.87 The evidence shows that MNS Attorneys purchased the sponsorship package in response to an open invitation and made payment related thereto directly to the Popo Molefe Foundation, the purpose of which, was to advance the objectives of the Trust and to promote the educational aspirations of previously disadvantaged youths.
- 6.1.88 The question that arises for the investigation was whether the sponsorship in question did not impinge on any of the policies of Transnet or give rise to a situation of conflict of interest or conflict with his fiduciary duties.

- 6.1.89 In addition to the ethical duties envisaged in clause 11 of the Transnet Ethics Code, Dr Molefe in his capacity as a non-executive director, has fiduciary duties, including the general duty to avoid a conflict of interests as discussed in case law above.
- 6.1.90 The definition of a conflict of interest is settled under common law and the regulatory framework canvassed above and generally relates to a situation where a director places himself in a position where their private or personal interests conflict or possibly (potentially) conflict with their official duties and responsibilities.
- 6.1.91 The King IV Report advises that conflict of interest of members of a governing body should be avoided in the pursuit of integrity and ethical leadership. To this end, the concept “*conflict of interest*” is also used to describe a situation of “*direct or indirect conflict, in fact or in appearance, between the interests of such member and that of the organisation.*”²⁴
- 6.1.92 The primary assumption of this definition is that the interest of the organisation is paramount. The implication is that any relationship of a member of such a body or committee “*that is or appears to be not in the best interest of the organization*” constitutes conflict with the interest of the organisation, which would subsequently “*prejudice an individual’s ability to perform his or her duties and responsibilities objectively.*”²⁵
- 6.1.93 It is also important to note the *Browns the Diamonds Store* case which dealt with the concept of possible conflict of interest and highlighted that the

²⁴ S, Sadler E. Conflict of interest: The case of a non-decision-making committee at a South African public higher education institution. *The Journal for Transdisciplinary Research in Southern Africa*, 2021,17(1), <https://doi.org/10.4102/td.v17i1.878>.

²⁵ Burnaby PA, Abdolmohammadi MJ, Hass S, et al., editors. *A global summary of the common body of knowledge 2006*. Altamonte Springs, FL: The Institute of Internal Auditors Research Foundation; 2006.

breach of fiduciary duty does not occur because of the mere existence of a possible conflict but how the potentially conflicted individual acts when such situations arise. In this case, there is no evidence at the Public Protector's disposal that Dr Molefe failed to avoid, disclose and/or manage a perceived conflict of interests in breach of his ethical or fiduciary duties towards Transnet.

- 6.1.94 Clause 5.3.6.3 of the Disclosures Policy requires a director to withdraw from matters being considered by the Board involving any direct or indirect personal interest or private business, unless the Board determines that the interest in question is trivial or irrelevant. Clause 5.5 of the Disclosure requires the director to recuse himself from the meeting when a matter is being decided upon after making disclosures of material information or any observations or pertinent insights relating to the matter where necessary.
- 6.1.95 Where a conflict of interest, actual or potential arises, the director is required in terms of the Companies Act and the Disclosures Policy, to declare or disclose such conflict to the Transnet Board. On declaration of such interest, the Board may allow the director to participate in the debate or matter before the Board but must give careful consideration to their personal integrity and the potential consequences that such participation may have to the company, the Board and himself personally. The legal position regarding actual or perceived conflict is therefore that only interests of a personal or private nature would require disclosure to the Board.
- 6.1.96 Gleaning from the clauses in the Disclosures Policy, it is evident that the existence of conflict in itself does not contravene the provisions of the Policy but requires management thereof.
- 6.1.97 It is manifest from the Disclosures Policy that conflict of interest in whichever form, arises generally when there is a matter to be considered or where there are proceedings before the Board.

- 6.1.98 Equally instructive from the judgement of the Constitutional Court in the *Public Protector and Others v President of the Republic of South Africa and Others* is that the risk of conflict would arise when a member is required to participate in the proceedings of any committee or adjudicate on a matter in which they hold a personal or private financial or business interests. In such a case, the member would avoid placing themselves at risk of conflict between their private interests and their official responsibilities by recusing themselves.
- 6.1.99 The Constitutional Court's approach is that the requirements for the prohibition of a conflict of interests are not satisfied by the existence of competing private interests and official responsibilities and a risk of a conflict, but is prompted by a member's conduct that exposes him to that risk. As contended in the *Democratic Alliance* case, the Constitutional Court reiterated that the perception of the conflict of interest must not be "*imaginary, flimsy or far-fetched*", but based on an assessment as to how the situation could reasonably appear to an outside observer.
- 6.1.100 To enunciate the point already made, the private interest of an official assumes a public dimension only if and when it impinges on or is perceived to impinge on some action or decision the official must take in the course of duty. If this occurs, the official becomes '*conflicted*' and must promptly consider the proper ethical path to take in the particular case.
- 6.1.101 The OECD emphasised that a conflict of interest, irrespective of the context, has shown to refer to an individual's private or personal interests, which may have an improper influence on the performance of his or her 'official duties and responsibilities'. These duties or responsibilities "*have shown to be*

*predominantly that of judgement and decision-making.*²⁶ (Added emphasis).

- 6.1.102 The existence of a conflict is therefore not necessarily an indication that an impropriety has occurred. The Institute of Directors: Southern Africa as well as the OECD emphasise that the management of the conflict is a crucial step in dealing with these issues and is the responsibility of the individual director.
- 6.1.103 As postulated in the King IV Report and clause 5.7 of the Disclosures Policy, the onus is on individual directors to assess whether he or she is free from apparent or actual conflicts.
- 6.1.104 In the circumstances of this case, it can be argued that conflict of interest, actual or perceived, or the risk of conflict between Dr Molefe's private interests and his official responsibilities could have arisen if he was required to deal with a matter involving MNS Attorneys after his Foundation received the sponsorship in question.
- 6.1.105 The Public Protector also reviewed the Transnet Legal Outsourcing Documents and noted that MNS Attorneys was instructed in February 2019 to conduct the Manganese Investigation, during Dr Molefe's tenure as Chairperson of the Transnet Board but there is no evidence to indicate that he or the Board were involved in such appointment.

²⁶ Hall M, Symes A, Luescher TM. 2002, Governance in South African higher education [homepage on the Internet]. Council of Higher Education. [cited 2020 Apr 21]. Available from: http://www.che.org.za/documents/d000006/Governance_Research_Report.pdf; Van Ees H, Gabrielsson J, Huse M. Toward a behavioral theory of boards and corporate governance. Corp Govern Int Rev. 2009;17(3):307–319. <https://doi.org/10.1111/j.1467-8683.2009.00741.x>; Williams-Jones B, MacDonald C. Conflict of interest policies at Canadian universities: Clarity and content. J Acad Ethics. 2008;6(1):79–90. <https://doi.org/10.1007/s10805-007-9052-6>

- 6.1.106 In relation to whether the purchase of the sponsorship package from the Popo Molefe Foundation was due to a corrupt relationship between Dr Molefe and MNS Attorneys or any of its officials, there was no evidence upon which to pursue an investigation in terms of section 6(5)(c) of the Public Protector Act.
- 6.1.107 The transaction between the Popo Molefe Foundation and MNS Attorneys is deemed to be private in nature. This matter accordingly fell outside the scope of the investigation of the Public Protector.

Conclusion

- 6.1.108 The invitations that were issued by the Popo Molefe Foundation and signed by Dr Molefe, were not issued out of or related to any position of authority that he occupied at Transnet, in that he was acting solely in the position of a trustee and the Chairperson of the Foundation. No Transnet facilities in both tangible or intangible forms as envisaged in clause 11.2.2 of the Transnet Ethics Code, were used or employed in the soliciting of the sponsorship by the Popo Molefe Foundation.
- 6.1.109 Furthermore, there is no evidence to conclude that Dr Molefe derived a benefit or furthered a private interest at the expense of Transnet because of the sponsorship made to the Popo Molefe Foundation or that he took decisions which were prejudicial to Transnet resulting therefrom.
- 6.1.110 The Public Protector could not find any evidence indicating that Dr Molefe exposed himself to a situation where he was required to declare and/or manage the perceived conflict of interest in accordance with the prescripts and disclosure requirement of the Disclosures Policy or the governance framework.

6.2 **Whether Transnet SOC Ltd failed to investigate allegations of corruption against Dr Popo Molefe in terms of clause 5.3 of the Transnet Ethics Code, in relation to the payment of R350 000 to the Popo Molefe Foundation Charitable Trust by MNS Attorneys, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act**

Common cause

6.2.1 Clause 5.3 of the Transnet Ethics Code stipulates that Transnet is committed to investigate “*all received reports (where possible).*”

6.2.2 On 30 July 2019, Transnet, through Dr Molefe, published a media statement addressing issues relating to the payment of R350 000 to the Popo Molefe Foundation by MNS Attorneys.

6.2.3 Mr Gordhan provided a written reply to the Parliamentary Question 1890 that was posed by a member of the EFF, Ms H O Mkhalihi, MP (Ms Mkhalihi) dealing with the same matter.

Issue in dispute

6.2.4 The issue for the Public Protector’s determination was whether Transnet failed to investigate the allegations relating to the payment of R350 000 to the Popo Molefe Foundation by MNS Attorneys in line with clause 5.3 of the Transnet Ethics Code.

The Complainant’s version

6.2.5 In her complaint to the Public Protector dated 15 November 2020, the Complainant requested the Public Protector to probe whether Transnet

investigated reports of alleged corruption regarding the payment of R350 000 to the Popo Molefe Foundation by MNS Attorneys.

Transnet's version

- 6.2.6 The Public Protector, through a letter, dated 04 May 2021, wrote to the Transnet GCE, requesting her to respond to the allegations raised by the Complainant. A letter was received from Ms Derby, through an email from Ms Wendy Hicks, dated 30 June 2021, stating that:
- 6.2.6.1 Transnet did not conduct an internal investigation into the payment of the R350 000 to the Popo Molefe Foundation, however, internal enquiries were made when similar Parliamentary Questions were posed to Mr Gordhan by the EFF in August 2020 and thereafter in October and November 2020;
- 6.2.6.2 Transnet remains committed to investigating all received reports (where possible) with regards to allegations of any breaches of the Transnet Ethics Code;
- 6.2.6.3 There was no evidence to suggest that Dr Molefe breached the Transnet Ethics Code, thus no investigation was conducted, in terms of clause 5.3 of the Transnet Ethics Code relating to the allegations of corruption in the payment of the R350 000 to the Popo Molefe Foundation by MNS Attorneys or its officials; and
- 6.2.6.4 On 30 July 2020, Dr Molefe published a media statement explaining that there was no unethical behaviour or relationship between MNS Attorneys and the Popo Molefe Foundation and that the payment of MNS Attorneys was like any other donation to a Trust.

Transnet media statement dated 30 July 2020

- 6.2.7 Ms Derby provided the Investigation Team with a copy of the Transnet media statement wherein, it was recorded, *inter alia*, that:

“The firm, MNS, is one of many corporates that sponsored a golf day run by the Popo Molefe Foundation to raise funds for disadvantaged young South Africans.

There is absolutely no conflict of interest in this. MNS publicly declared its support for the event and announced it in line with its corporate social investment programme. Its support is listed on the Popo Molefe Foundation’s website, along with other supporters.”

Request for further information

- 6.2.8 The Public Protector, through a letter dated 20 July 2021, requested Ms Derby to provide, amongst others, copies of reports received by Transnet in terms of clause 5.3 of the Transnet Ethics Code. Ms Derby responded to the Public Protector through a letter dated 04 September 2021.

- 6.2.9 In her response, Ms Derby reiterated that no investigation was conducted by Transnet relating to this matter but indicated that internal enquiries were made in order to provide responses to Parliamentary Question 1890.

Written reply to Parliamentary Question 1890

- 6.2.10 Ms Derby also availed a copy of a written reply to Parliamentary Question 1890, which recorded, *inter alia*, that:

“QUESTION: 1890. Ms H O Mkhali (EFF) to ask the Minister of Public Enterprises: (1) What are the reasons that (a) he has not taken any action

against a certain company (name furnished) amidst the allegations of corruption and money laundering and (b) the contract of the specified company was extended by Transnet; (2) Whether he has found that a certain person (name and details furnished) received a donation of R300 000 from the specified company through a foundation?

REPLY: *According to the information received from Transnet: (1)(a) According to MNS the allegations of bribery and kickbacks as published in the City Press were malicious and defamatory. As a result, MNS lodged a complaint against City Press with the Press Council.*

The Press Council rejected the City Press allegations of bribery and kickbacks and directed City Press to publish an apology to MNS and to Mr Ndlovu for:

1.1.1 *Unjustifiably reflecting in its reportage, both in the headlines and in the text of the article, that MNS had been implicated in kickbacks, alleged acts of corruption and bribery; and*

1.1.2 *Unnecessarily tarnishing their reputation.*

(1)(b) MNS was appointed onto Transnet's legal panel through a fair, just and equitable procurement process during 2017. The panel was appointed for a period of 3 years.

(2) The allegations of Dr Molefe receiving R300 000 from MNS have been peddled since June 2019 and despite the facts being put on the table on numerous occasions, the allegations are repeated by the EFF.

MNS received a request from the Popo Molefe Foundation Charitable Trust to make a sponsorship/donation to the Charitable Trust to provide bursaries to previously disadvantaged students who cannot afford the costs of tertiary education. MNS was not the only recipient of this request. A number of

companies and individuals were approached with a similar request. A copy of the request letter is attached hereto as Annexure “A”.

The Charitable Trust organized a Golf Day and Gala Dinner on 31 May 2019 as part of its fund raising programme. All potential donors/sponsors could contribute to advance the educational aspirations of previously disadvantaged students. In this regard MNS contributed an amount of R350 000 to the Charitable Trust, which entitled MNS and other sponsors/donors to inter alia be recognized and listed on the various branding platforms that the Charitable Trust employed. This included amongst others, being publicly mentioned at the Gala Dinner and listed on the Charitable Trust’s website for the contribution made to the Charitable Trust in the 2019 fund raising programme.

There was no direct or indirect benefit to either Dr Molefe or any of his family members arising from the funds donated to the Charitable Trust. The sole beneficiaries of the Charitable Trust are disadvantaged students benefitting from the Charitable Trust through bursaries to pay for their tertiary fees. Save for the donation referred to above, MNS has not, either directly or indirectly advanced any donation/loan/payment to Dr Molefe or any of his associated entities.”

Letter from Mr Mamaregane, dated 29 November 2023

- 6.2.11 Through a letter dated 02 November 2023, the Public Protector requested Transnet to clarify the application of clause 5.3 of the Transnet Ethics Code. In his response dated 29 November 2023, Mr Mamaregane reported that the term “*received reports*” in the Transnet Ethics Code likely refers to reports or complaints submitted to Transnet by employees, stakeholders, or members of the public regarding unethical conduct, violations of the Transnet Ethics Code, or any other matter that may require investigation.

6.2.12 Further that while the Code itself may not provide a specific definition for “*received reports*,” it generally encompasses any formal or informal complaints, concerns, or information brought to the attention of Transnet regarding potential ethical violations or misconduct within the organisation; and

6.2.13 External stakeholders may include customers, suppliers, regulatory agencies, members of the public, or any other parties with an interest in Transnet's activities.

Transnet Investigations and Fraud and Risk Management Standard Operating Procedure, 2021

6.2.14 In his response dated 29 November 2023, Mr Mamaregane also provided a copy of the document titled “*Transnet Investigations and FRM²⁷ Standard Operating Procedure*”²⁸ (Investigation SOP).

6.2.15 Paragraph 4 of the Investigation SOP deals with the mandate of the Investigations and FRM department and provides, *inter alia*, that, investigations involving Investigations personnel, the CSO [Chief Security Officer], Ms Derby and members of the Board would be dealt with in a separate process to be developed.

Submission from the Secretary of the Transnet Board, Ms Shokie Bopape

6.2.16 The Public Protector, through a letter dated 01 December 2023, requested, Ms Bopape to respond to a number of issues relating to the investigation in terms of the Transnet Ethics Code. In her response dated 08 December 2023, Ms Bopape reported the following:

²⁷ Fraud Risk Management
²⁸ Became effective on 19 April 2021.

- 6.2.16.1 There is no SOP annexed to the Transnet Ethics Code with specific reference to clause 5.3. Equally, there is no documented process to be followed when investigating reports implicating Non-Executive Directors. However, the Transnet Ethics Code is implemented in line with other relevant documents highlighted in paragraph 36.1, namely, the Disclosures Policy, the Anti-Fraud and the Corruption Policy, Transnet Whistle Blowing Policy, etc;
- 6.2.16.2 In terms of paragraph 4 of the Investigation SOP, investigations involving Board members are to be dealt with in a separate process to be developed, however, this process has not yet been undertaken;
- 6.2.16.3 However, paragraph 12 of the Disclosures Policy stipulates as follows:
- “12.1 *Non-compliance with this policy and the procedures is considered to be breach of this policy. It may also be considered a contravention of the common law, the PFMA; and/or the Companies Act. Depending on the extent of non-compliance, the Non-Executive Directors may invoke the provisions of section 71 of the Companies Act.*
- 12.2 *All suspected incidents of contraventions of this policy should be reported to the Transnet Tip-offs Anonymous Hotline on 0800 003 056, Chairperson of the Audit Committee for investigation.*”
- 6.2.16.4 Management recognised the gap in the Anti-Fraud and Corruption Policy²⁹ and included certain provisions in the revised policy. Paragraph 16.1 was one such provision which read as follows:

²⁹ Approved on 28 September 2021.

“To the extent that allegations of fraud and corruption and any malfeasance specially identified in this policy involving the Non-Executive Directors and Board Members, such shall be referred to the Department of Public Enterprises [DPE] for further handling and for the necessary consequence management.”

6.2.17 Paragraph 19.4 of the Anti-Fraud and Corruption Policy stipulates that, *“All suspected incidents of contraventions of this policy should be reported to Management, via the Transnet Tip-Offs Anonymous Hotline or to Transnet Group Investigations & Fraud Risk Management”*.

6.2.18 During a telephonic conversation on 27 February 2024, the Investigation Team further requested Ms Bopape to provide clarity regarding whether Transnet had developed an SOP relating to the investigation of Board members and others as envisaged in the Investigation SOP. She indicated that the process of developing the said SOP, which should be spearheaded by the Head of Legal Services, had not commenced.

Transnet Code of Ethics Commitment Statement, 2023

6.2.19 Transnet, through an email dated 28 February 2024, also availed a copy of the document titled *“Transnet Code of Ethics Commitment Statement”*³⁰ (Transnet Commitment Statement) approved by the Transnet Board on 31 May 2023, as requested by the Investigation Team.

6.2.20 Paragraph 4.9 of the Transnet Commitment Statement stipulates that Transnet employees and Non-Executive Directors are expected to uphold ethical standards which include:

³⁰ This policy has replaced the Transnet Executive Code.

“To report any acts of fraud, theft, corruption, any other economic crime, and unethical conduct or activities in line with ethics related policies and procedures. These include, but not limited to, the Transnet Anti-Fraud and Corruption, Whistle Blowing, and No Gifts and Hospitality Policies”. (sic)

- 6.2.21 Paragraph 6 of the Transnet Commitment Statement provides for the establishment of the anonymous tip-offs or ethics hotline which can be utilised to report any suspected violations of the Transnet policies.

Dr Popo Molefe’s response

- 6.2.22 In a letter dated 27 July 2021, the Public Protector requested Dr Molefe to indicate whether Transnet investigated reports of the alleged corruption in respect of the payment to Popo Molefe Foundation in terms clause 5.3 of Transnet Ethics Code.

- 6.2.23 In his response to the Public Protector dated 03 September 2021, Dr Molefe indicated that despite his best efforts to respond to this question, he was unable to determine if the said investigation was undertaken by Transnet.

Responses to the section 7(9)(a) Notice

- 6.2.24 On 20 May 2024, the Investigation Team electronically transmitted section 7(9) Notices to Mr Gordhan, Mr Sangqu and Ms Phillips affording them an opportunity to make representations regarding the intended findings and recommendations of the Public Protector.

Response from Mr Gordhan

- 6.2.25 On 30 May 2024, Mr Gordhan noted the proposed recommendations as contained the section 7(9) Notice and undertook to ensure that the Transnet Board implements the recommendations upon receipt of the final report.

Response from the GCE, Ms Michelle Phillips

- 6.2.26 On 10 June 2024, Ms Phillips responded to the section 7(9) Notice indicating that:
- 6.2.26.1 Transnet notes and welcomes the recommendations made by the Public Protector and would carefully consider the feasibility of implementing same within its policy framework;
- 6.2.26.2 Transnet recognises the need to review and potentially amend Transnet's policies for consistency, especially regarding the SOP for complaint handling and investigations, and the Anti-Fraud and Corruption Policy;
- 6.2.26.3 Transnet has a No Gifts and Hospitality Policy which precludes its employees and non-executive directors from sourcing or accepting gifts from suppliers of Transnet. Equally, the Transnet Ethics Statement advocates that both employees and non-executive directors must *“refrain from engaging in practices that could lead to potential and/or perceived conflict of interest, or cause damage and/or loss to Transnet”*. The No Gifts and Hospitality Policy is also due for review in the current financial year and would be reviewed against the recommendations outlined in the section 7(9) Notice.

Applicable law

Transnet Ethics Code

- 6.2.27 Clause 4 of the Transnet Ethics Code stipulates that:

“This Code sets out a code of conduct that requires employees and Non-executive directors to observe a high standard of business and personal ethics in the conduct of their duties and responsibilities. It is critical that

employees and Non-executive directors demonstrate honesty and integrity in fulfilling their responsibilities and comply with all applicable policies, laws and regulations. It is the responsibility of all employees and Non-executive directors to report violations of this Code.”

- 6.2.28 Clause 5.3 of the Transnet Ethics Code stipulates that Transnet is committed to investigate “*all received reports (where possible).*”

Analysis

- 6.2.29 The evidence before the Public Protector indicates that Mr Gordhan, in his capacity as the Minister of Public Enterprises, received and responded to a Parliamentary Question 1890 relating to a sponsorship by MNS Attorneys to the Popo Molefe Foundation.
- 6.2.30 Evidence in the Public Protector’s possession indicates that Mr Gordhan responded to the Parliamentary Question and stated, *inter alia*, that, there was no direct or indirect benefit to either Dr Molefe or any of his family members arising from the funds donated to the Charitable Trust. As a result, Transnet arrived at the conclusion that there was no irregularity which prevailed on Transnet to pursue the matter further in terms of clause 5.3. of the Code.
- 6.2.31 During the investigation, the Public Protector noted that although clause 5.3 of the Transnet Ethics Code made provision for the investigation of received reports, there was no designated SOP providing details on how to report and undertake such investigations. In particular, there was no prescribed process established for managing received reports implicating Non-Executive Directors and Board members.
- 6.2.32 Transnet subsequently approved the Investigation SOP effective from 19 April 2021, which provides for a detailed prescribed process to be followed

when Transnet investigates allegations of theft, fraud and corruption. The Investigation SOP mandates the Investigations and FRM department to conduct such investigations, but excludes investigations involving its personnel, the CSO, the GCE and members of the Board.

- 6.2.33 Conversely, paragraph 4 of the Investigation SOP, also provides that investigations involving the Investigations personnel, the CSO, the GCE and Board members would be dealt with in a separate process to be developed. However, Transnet confirmed, through Ms Bopape, that the distinct process envisaged in the aforementioned SOP has not yet been developed.
- 6.2.34 Notably, the Transnet Ethics Code has been replaced by the Transnet Commitment Statement, which was approved by the Transnet Board on 31 May 2023. The Transnet Commitment Statement has since dispensed with clause 5.3 of the Transnet Ethics Code and requires acts of fraud, theft, corruption, any other economic crime and unethical conduct to be reported in line with ethics related policies and procedures.
- 6.2.35 It is evident that paragraph 16 of the Anti-Fraud and Corruption Policy requires that allegations of fraud and corruption and any malfeasance specifically identified in this policy involving the non-executive Directors be referred to the DPE for further handling. However, there appears to be no SOP providing specific details regarding the reporting procedure to the DPE.
- 6.2.36 Paragraph 19.4 of the Anti-Fraud and Corruption Policy specifically requires all suspected incidents of contravention of the Policy to be reported through the Ethics Hotline or to the Investigations and FRM department. Whereas the Anti-Fraud and Corruption Policy now directs that alleged contravention by Board members are to be referred to the DPE, the Investigation SOP excludes the investigations involving the Investigation personnel, the CSO

and the GCE, thus leaving a gap that should be addressed as envisaged in the Investigation SOP.

- 6.2.37 Transnet has since undertaken in its response to the section 7(9) notice, to review the SOP for complaint handling and investigation and the Anti-Fraud and Corruption Policy.

Conclusion

- 6.2.38 The investigation by the Public Protector found no evidence that Transnet failed to investigate the sponsorship made by MNS Attorneys to the Popo Molefe Foundation in terms of clause 5.3 of the Transnet Ethics Code. There was no SOP, detailing the procedure, on which Transnet could have relied on to conduct an investigation in this regard.

7. FINDINGS

Having regard to the evidence and the regulatory framework determining the standard that should have been complied with, the Public Protector makes the following findings:

- 7.1 **Whether Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by Mncedisi Ndlovu & Sedumedi Attorneys, a service provider to Transnet, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and in terms of section 6(5)(b) of the Public Protector Act**

- 7.1.1 The allegation that Dr Popo Molefe, in his capacity as the Chairperson of the Transnet Board, contravened clause 11.2.2 of the Transnet Ethics Code and/or failed to manage any actual or perceived conflict of interest, in relation to his interest in the Popo Molefe Foundation and the purchase of a sponsorship package from the Foundation in the amount of R350 000 by MNS Attorneys, a service provider to Transnet, **is not substantiated**.
- 7.1.2 MNS Attorneys was already a service provider to Transnet, prior to the appointment of Dr Molefe as chairperson of the Board, furthermore, MNS Attorneys was receiving instructions to do work before his appointment. No evidence could be found to suggest that MNS Attorneys had an unfair advantage emanating from the relationship with the Popo Molefe Foundation. The Public Protector could not find evidence suggesting that Transnet facilities in both tangible or intangible forms as envisaged in Clause 11.2.2 of the Transnet Ethics Code, were used or employed in the soliciting of the sponsorship by the Popo Molefe Foundation.
- 7.1.3 Furthermore, there is no evidence that Dr Molefe sought to use his position or Transnet facilities to advance his private interests, or actually derived any benefit at the expense of Transnet as a result of the sponsorship made to the Popo Molefe Foundation or took decisions which were prejudicial to Transnet resulting therefrom.
- 7.1.4 The Public Protector found that Dr Molefe declared his interests in the Popo Molefe Foundation and could not find evidence indicating that Dr Molefe has a personal financial interest in MNS Attorneys, which required him to declare to Transnet as contemplated in section 75 of the Companies Act and the provisions of the Disclosures Policy.
- 7.1.5 Accordingly, the Public Protector could not find evidence to conclude that the conduct of Dr Molefe constitutes improper conduct as contemplated in

section 182(1)(a) of the Constitution and section 6(5)(b) of the Public Protector Act.

7.2 Whether Transnet SOC Ltd failed to investigate allegations of corruption against Dr Popo Molefe in terms of clause 5.3 of the Transnet Ethics Code, in relation to the payment of R350 000 to the Popo Molefe Foundation Charitable Trust by MNS Attorneys, if so, whether such conduct is improper as envisaged in section 182(1)(a) of the Constitution and amounts to maladministration in terms of section 6(5)(a) of the Public Protector Act

7.2.1 The allegation that Transnet failed to investigate allegations of corruption against Dr Molefe in relation to the payment of R350 000 to the Popo Molefe Foundation by MNS Attorneys in terms of clause 5.3 of the Transnet Ethics Code, **is not substantiated.**

7.2.2 The Transnet Ethics Code does not provide for the procedure to be undertaken for the investigation of complaints against non-executive directors as contemplated in clause 5.3, considering that Board members are not employees.

7.2.3 Accordingly, the conduct of the Transnet Board does not constitute improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration in terms of section 6(5)(a) of the Public Protector Act.

8. OBSERVATIONS

8.1 The Public Protector's investigation identified deficiencies relating to the absence of a clear procedure and process for the reporting and investigation of violations of the Transnet ethics related policies by members of the Board. Although, this had been partially addressed through the Transnet Commitment Statement, which was approved by the Transnet Board on 31

May 2023, there is no SOP providing for a detailed procedure and process to be followed.

8.2 The Public Protector further observed that paragraph 4 of the Investigation SOP, contains an exclusion for the Investigations and FRM department to conduct investigations against the Board members and stipulates that such investigations should be handled through a separate process, yet to be established. The Public Protector observed that, a separate process that was proposed in 2021 is still outstanding.

8.3 The Public Protector is of the view that it is imperative that Transnet and the shareholder Department determine the process to be followed to report and investigate complaints against non-executive directors.

8.4 In its response to the section 7(9) Notice, Transnet recognised the need to review and potentially amend Transnet's policies for consistency, especially regarding the SOP for complaint handling and investigations, and Anti-Fraud and Corruption Policy. Transnet further identified the No Gifts and Hospitality Policy as the appropriate vehicle to accommodate the recommendation that non-executive directors should be required to disclose any donations and/or sponsorships received directly, in their personal capacity, or indirectly, accruing to other private interests, such as Non-Profit Organisations, Trusts, Foundations, from service providers doing business with Transnet.

9. RECOMMENDATIONS

9.1 In light of the observations, the following recommendations are made in terms of section 6(4)(c)(ii) of the Public Protector Act.

The Minister of Public Enterprises

- 9.1.1 Take note of the report and **within one hundred and twenty (120) days**, facilitate the development of a procedure for the reporting and investigation of complaints against non-executive directors, in terms of section 15(3) of the Companies Act, 2008, as amended, read with paragraph 6 of the Transnet's Memorandum of Incorporation.

The Transnet Board of Directors

- 9.1.2 Take note of the report and ensure that **within one hundred and twenty (120) days** the GCE develops the SOP dealing with the complaint handling process and investigations concerning the Investigations personnel, the CSO the GCE and Board members as contemplated in paragraph 4 of the Investigation SOP and the referral process stipulated in paragraph 16.1 of the Anti-Fraud and Corruption Policy.
- 9.1.3 **Within one hundred and twenty (120) calendar days** upon receipt of the final report, review the Declaration of Interest and Related Party Disclosures Policy for Non-Executive Directors, 2021 and/or related governance instruments to require the Non-Executive Directors to disclose, **within thirty (30) calendar days**, any donations and/or sponsorships received directly, in their personal capacity, or indirectly, accruing to other private interests, such as Non-Profit Organisations, Trusts, Foundations, from service providers doing business with Transnet, in terms of section 15(3) of the Companies Act, 2008, as amended, read with paragraph 6 of the Transnet's Memorandum of Incorporation.

The Group Chief Executive of Transnet

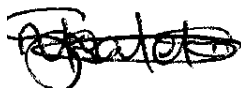
- 9.1.4 **Within one hundred and twenty (120) calendar days** upon receipt of the final report, take steps to ensure that a separate process is established and

approved to deal with the complaint handling process and investigations concerning the Investigations personnel, the CSO, the GCE and Board members as contemplated in paragraph 4 of the Investigation SOP and the referral process stipulated in paragraph 16.1 of the Anti-Fraud and Corruption Policy.

10. MONITORING

10.1 The Minister and the Chairperson of the Transnet Board, **within thirty (30) calendar days** of the report, provide the Public Protector with an action plan with timelines, outlining how the recommendations contained in paragraph 9 above will be implemented.

10.2 The Minister and the Chairperson of the Transnet Board, **within thirty (30) calendar days** after the expiry of the one hundred and twenty (120) calendar day period stated in paragraph 9 above, furnish the Public Protector with a close-out report on the implementation of the recommendations.



ADV. KHOLEKA GCALEKA
PUBLIC PROTECTOR
REPUBLIC OF SOUTH AFRICA
DATE: 30 JUNE 2024

Assisted by: Ms Ponatshego Mogaladi
Executive Manager: Investigations