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) OF THE PUBLIC PROTECTOR ACT NO 23 OF 1994

PUBLIC PROTECTOR
SOUTH AFRICA

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ALLEGATIONS OF MALADMINISTRATION AND UNFAIR CONDUCT BY OFFICIALS OF TRANSNET SOC LTD IN RESPECT OF DISCIPLINARY MATTERS INVOLVING A NUMBER OF COMPLAINTS

REPORT ON AN INVESTIGATION INTO AA PROTECTED DISCLOSURE MADE TO THE PUBLIC PROTECTOR IN TERMS OF THE PROTECTED DISCLOSURES ACT 26 OF 2000, AND ALLEGATIONS OF IMPROPER CONDUCT IN TERMS OF THE PUBLIC PROTECTOR ACT 23 OF 1994 MADE AGAINST TRANSNET SOC LTD IN RESPECT OF DISCIPLINARY ACTION TAKEN AGAINST A NUMBER OF COMPLAINANTS

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Executive Summary

(i) This is the Public Protector's report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act No. 23 of 1994.

(ii) The report communicates the Public Protector's findings and the appropriate remedial taken in terms of section 182(1)(c) of the Constitution, following an investigation into allegations of unlawful or irregular conduct by Transnet or employees in the employ of Transnet pertaining to a protected disclosure made to the Public Protector in terms of section 8(1) of the Protected Disclosures Act No. 26 of 2000 (the PDA), and complaints of unfair or improper conduct by Transnet as an employer.

(iii) The complaint was lodged with the Public Protector in February 2011. The Complainants are:

a) Mr L Mali;
b) Mr C M Xaba;
c) Mr B Fredericks;
d) Mr J Blose;
e) Mr B Ndlovu;
f) Ms B Williams; and
g) Mr B Ngwenya.

(iv) The complaint is augmented by a related protected disclosure made to the Public Protector in terms of the PDA related to the conduct of, amongst others, the General Manager: Group Employee Relations and the Executive Manager Labour Law, Group Employee Relations of Transnet, regarding the appointment of

arbitrators to hear arbitrations in the Transnet Bargaining Council (TBC), and the unlawful interception of telephone communications of employees.

(v) The investigation was conducted in terms of section 182 of the Constitution of the Republic of South Africa, 1996 (the Constitution) which gives the Public Protector the power to investigate alleged or suspected improper or prejudicial conduct in state affairs, to report on that conduct and to take appropriate redial action, and section 6(4) of the Public Protector Act regulating the manner in which the power conferred by section 182 of the Constitution may be exercised in respect of government at any level.

(vi) The investigation process commenced with a preliminary investigation in terms of which evidence and information gathered was used to compile a provisional report. All the parties involved were engaged on the Public Protector's intended findings in terms of section 7(9) of the Act, and made substantive submissions with additional evidence in response to the Public Protector's Provisional Report. Engagement also ensued between the Management of Transnet and the Public Protector to explore options for the resolution of the matter by means of mediation, conciliation or negotiation in terms of section 6(4)(b)(i) of the Public Protector Act as a possible alternative to the publication of findings and remedial action by virtue of section 8(1) of the Public Protector Act. The process in terms of section 6(4)(b) (i) of the Act did not proceed to its conclusion.

(vii) On analysis of the complaint, the following issues were considered and investigated:

(a) Whether Transnet as the employer improperly attempted to influence the outcome of arbitration proceedings in the Transnet Bargaining Council (the TBC) in its favour by endeavouring to control the appointment of arbitrators;

(b) Whether Transnet or employees in its employ improperly engaged in the unlawful monitoring of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s);

(c) Whether Transnet improperly failed to follow due process in the disciplinary action and subsequent dismissal of the Complainants;

(d) Whether Transnet treated the Complainants unfairly by seeking to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts;

(e) Whether Transnet improperly failed to reinstate the Complainant, Mr Mali, in compliance with an arbitration award in favour of the Complainant

(f) Whether Transnet treated the Complainants unfairly based on the inconsistent application of discipline, by failing to act against other employees in similar instances of the same acts of alleged financial misconduct;

(g) Whether Transnet improperly victimised the Complainants because of their perceived loyalty to or support of a Member of the Executive Management

of Transnet who was at the time identified as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet;

(viii) The investigation process included an analysis of applicable laws, correspondence, meetings with officials of Transnet, perusal of responses to the provisional report of the Public Protector.

(ix) In arriving at the findings, the Public Protector was guided by the standard approach adopted by the office, which simply asks: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

(x) As is customary, the "what happened" enquiry is factual question settled on the assessment of evidence and making a determination on a balance of probabilities. The question regarding what should have happened on the other hand relates to the standard that the conduct should have complied with.

(xi) In determining the standard that Transnet and its functionaries should have complied with to avoid improper conduct and maladministration, the Public Protector was guided, as customary by the Constitution, national legislation and applicable policies and guidelines. Key among these policies was the Protected Disclosure Act No. 26 of 2000; the Labour Relations Act No. 66 of 1995 and the Promotion of Administrative Justice Act No. 3 of 2000.

(xii) Having considered the evidence uncovered during the investigation against the relevant framework, the Public Protector makes the following findings::

(a) Regarding whether Transnet as the employer improperly attempted to influence the outcome of arbitration proceedings in the Transnet Bargaining Council in its favour by endeavouring to control the appointment of arbitrators:

aa) The allegation that Transnet improperly attempted to influence the outcome of arbitration proceedings in the TBC in its favour by endeavouring to control the appointment of arbitrators is substantiated;

bb) Transnet went beyond what could be reasonably regarded as exploring the suitability of arbitrators, in total disregard for the privacy of the parties involved and its legal duty of good faith towards its employees as well as its stated commitment to the TBC dispute resolution processes;

cc) Under the circumstances, Transnet's efforts at the time to ensure that it has the deciding vote or final say in the appointment of arbitrators in the TBC can be construed as attempts to undermine the dispute resolution processes governed by Rule 22 of the TBC Rules aimed at safeguarding the impartiality of arbitrators and ensuring that both parties enjoy equal protection and benefit of the law. Transnet's conduct fall foul of the spirit of the law as embodied in sections 9(1) and 34 of the Constitution; and

dd) Transnet's actions constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

b) Regarding whether Transnet or employees in its employment improperly engaged in the unlawful monitoring of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s)

aa) The allegation that Transnet or employees in its employment improperly engaged in the unlawful monitoring of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s) is substantiated;

bb) A protected disclosure made to the Public Protector in terms of section 8(1) of the Protected Disclosure Act revealed that there were instances where Transnet intercepted the communications of an employee without the consent of the employee, or obtained information through the unlawful monitoring or surveillance of the employee;

cc) The actions of Transnet and the relevant employees involved in such conduct was in violation of the provisions of Regulation 2 read with Regulation 6 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act No. 70 of 2002, as Transnet was not legitimately pursuing suspicions of misconduct on communication facilities that had been provided by Transnet;

dd) Transnet disregarded the right to privacy of the employee concerned provided for in section 14 of the Constitution, as well as the common law reciprocal duty of good faith between employer and employee; and

ee) Transnet's action constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

c) **Whether Transnet improperly failed to follow due process in the disciplinary action and subsequent dismissal of the Complainants:**

aa) The allegation that Transnet improperly failed to follow due process in the disciplinary action and subsequent dismissal of the Complainants is not substantiated;

bb) The Complainants challenged the lawfulness of their dismissal in the appropriate forums provided for in the Labour Relations Act where the substantive and procedural fairness of such dismissals were confirmed by an award or order of the Court;

cc) However, the findings of the arbitrators or the labour court do not preclude the Public Protector from determining whether or not the behaviour of Transnet complied with the principles and requirements of proper administration. The Public Protector observed that Transnet's conduct violated the principles of fairness and equity envisaged in section 9; 10; 23 and 33 of the Constitution; and

dd) Transnet's action constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

d) Regarding whether Transnet treated the Complainants unfairly by seeking to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts:

aa) The allegation that Transnet treated Complainants unfairly by seeking to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts is substantiated;

bb) Transnet's approach to the incidents and the lengths to which it selectively went to take action against all suspected of being involved, demonstrated a certain level of vindictiveness against whistle-blowers, which cannot be reconciled with the country's national and international commitments to accountable and transparent governance under, *inter alia*, article 13(1) (b) and (d) of the United Nations Convention Against Corruption (UNCAC) and the National Development Plan, 2030;

cc) Transnet's actions are therefore not consistent with key principles underpinning good corporate governance, governing public administration as set out in sections 195(1) and (2)(b) of the Constitution; and

dd) The Public Protector finds that Transnet's actions in this regard constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

e) **Regarding whether Transnet improperly failed to reinstate the Complainant, Mr Mali, in compliance with an arbitration award in favour of the Complainant:**

aa) The allegation that Transnet improperly failed to reinstate the Complainant, Mr Mali, in compliance with an arbitration award in favour of the Complainant is not substantiated;

bb) The arbitration award was issued on 1 September 2010 and Transnet subsequently took the matter on review to the Labour Court;

cc) On 22 October 2010 Transnet obtained an order to stay the enforcement of the arbitration award pending the outcome of the review proceedings. The Labour Court ruled in Transnet's favour on 30 May 2012 that Mr Mali's dismissal was substantively fair; and

dd) The Public Protector could not find any improper conduct, undue delay or maladministration on the part of Transnet in relation to the implementation of the arbitration award in respect of Mr Mali.

f) **Regarding whether Transnet treated the Complainants unfairly based on the inconsistent application of discipline, by failing to act against other employees in similar instances of the same acts of alleged financial misconduct:**

aa) The allegation that disciplinary action was taken selectively against the Complainants while other Transnet employees who were involved and who might have been co-perpetrators, were never charged, is substantiated;

bb) A Transnet Forensic Investigation confirmed that during the period in question, from 2007 to 2011, there were a number of projects where non-compliance with Transnet procurement procedures were condoned and persons responsible for non-compliance were not subjected to the disciplinary processes;

cc) At the same time the Complainants, Messrs Ndlovu, Ngwenya and Blose were charged and dismissed for similar charges without any option for condonation;

dd) Transnet's failure to ensure consistency in respect of the institution and management of disciplinary processes for non-compliance with procurement procedures violated the principles of fairness and equity or equality envisaged in sections 9, 10, 23 and 33 of the Constitution; and

ee) Transnet's actions amount to maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

g) Regarding whether Transnet improperly victimised the Complainants because of their perceived loyalty to or support of a Member of the Executive Management of Transnet who was at the time identified as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet:

aa) The allegation that Transnet improperly victimised Complainants because of their perceived loyalty to a Member of the Executive

Management of Transnet who was at the time identified as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet, is substantiated;

bb) A number of factors collectively, in terms of all the issues covered in the Public Protector's investigation, buttressed by an objective assessment of the evidence at hand, raise sufficient doubt about the real motivation behind Transnet's actions against the Complainants.

cc) There is evidence to support a perception of bias that tainted the entire process, and include objective evidence of a succession struggle within Transnet after the resignation of Ms Maria Ramos as Group CEO, Transnet's unlawful monitoring and interception of employees' private communications, selected and inconsistent disciplinary practices and the level of malevolence displayed towards suspected whistle-blowers;

dd) Transnet's behaviour overall is in violation of the values and principles protected by sections 23 and 33 of the Constitution, as well as the prohibition of action taken for an ulterior purpose or motive in terms of section 6(2) (e) (ii) of PAJA and actions taken in bad faith, arbitrarily or capriciously in terms of sections 6(2) (e) (v) and (vi) of PAJA; and

ee) Accordingly Transnet's actions amount to maladministration as envisaged in section 6 (4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

xii) The appropriate remedial action that the Public Protector is taking in terms of section 182(1)(c) of the Constitution is the following:

a) The Chief Executive Officer of Transnet is to:

aa) Ensure that Transnet diligently complies with its obligations in terms of the TBC Constitution and Rules relating to the appointment of arbitrators in the TBC to ensure that the conduct of its employees meets the requirements of good faith and fairness envisaged in section 23 of the Constitution.

bb) Ensure that action is taken, including reporting the matter to the South African Police Service, to deal with violations of its Telephone, Email and Electronic Communications Policy and the unlawful interception and monitoring of communications, contemplated by the Regulation of Interception of Communications and Provision of Communication-related Information Act by Transnet officials.

cc) Embark on a process in consultation with the Complainants through the Office of the Public Protector, to provide the Complainants with a financial remedy not less than an amount equal to the remuneration which may be paid to an employee in lieu of reinstatement to a maximum of 24 months.

dd) Provide all the complainants with reasonable compensation for legal costs incurred, as well as a remedy including a reasonable amount to the value of at least one year's annual salary, as settlement for

consolatory compensation, to address the financial and emotional distress and trauma experienced by them and their families as a result of the manner in which the matter has been handled by Transnet.

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPRIETY BY TRANSNET SOC LTD, MADE TO THE PUBLIC PROTECTOR IN TERMS OF SECTION 8 OF THE PROTECTED DISCLOSURES ACT 26 OF 2000, AND BY MEANS OF COMPLAINTS LODGED IN TERMS OF THE PUBLIC PROTECTOR ACT 23 OF 1994

1. INTRODUCTION

1.1 This is the Public Protector's report issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) and Section 8(1) of the Public Protector Act No. 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(1) of the Public Protector Act to:

1.2.1 The Chairman of the Board of Directors of Transnet SOC Ltd (Transnet);

1.2.2 The Chief Executive Officer (CEO) of Transnet;

1.2.3 The General Secretary of the Transnet Bargaining Council; and

1.2.4 The Minister of Public Enterprises.

1.3 A copy of the report will also be provided to the Complainants to inform them about the outcome of the Public Protector's investigation.

1.4 The report relates to an investigation into –

1.4.1. Allegations of unlawful or irregular conduct by Transnet or employees in the employ of Transnet, pertaining to a protected disclosure made to the Public Protector in terms of section 8(1) of the Protected Disclosures Act No. 26 of 2000 (the PDA); and

1.4.2 Complaints of unfair or improper conduct by Transnet as the employer, lodged by the following individual employees and former employees of Transnet:

1.4.2.1 Mr L Mali;

1.4.2.2 Mr C M Xaba;

1.4.2.3 Mr B Fredericks;

1.4.2.4 Mr J Blose;

1.4.2.5 Mr B Ndlovu;

1.4.2.6 Ms B Williams; and

1.4.2.7 Mr B Ngwenya

2. THE COMPLAINT

2.1 Disclosure in terms of the PDA

2.1.1 In February 2011, the Public Protector was provided with information regarding alleged unlawful or irregular conduct by Transnet or employees in the employ of Transnet that was deemed to be a protected disclosure to the Public Protector in terms of section 8(1) of the PDA.

2.1.2 The disclosure related to the conduct of amongst others the General Manager: Group Employee Relations and the Executive Manager Labour Law, Group Employee Relations of Transnet, regarding the appointment of arbitrators to hear arbitrations in the Transnet Bargaining Council (TBC) and the unlawful interception of telephone communications of employees.

2.1.3 The person making the disclosure is of the view that the information concerned showed or tended to show that a miscarriage of justice has occurred, was occurring or was likely to occur, as intended by the PDA.

2.2 Collective complaints

2.2.1 The Complainants each raised individual complaints with the Public Protector, but as a collective their allegations have a number of aspects in common, including the following:

2.2.1.1 The decisions to institute disciplinary action against the employees who were charged with financial misconduct were inconsistent because other employees and managers involved in the same or similar transactions were not prosecuted, or their actions were condoned.

2.2.1.2 The Complainants were in one way or another linked to disciplinary action that Transnet was, at the time, taking against Mr Siyabonga Gama, Chief Executive: Transnet Freight Rail. The alleged misconduct with which they were charged with was either linked to matters where Mr Gama was involved, or because they were perceived to be supporters of Mr Gama as a (then) possible successor to Ms M Ramos as CEO of Transnet;

2.2.1.3 The disciplinary processes were conducted in an arbitrarily and hurried manner, without due regard for proper processes and sufficient information and time for the Complainants to prepare for the disciplinary hearings;

2.2.1.4 Charges were brought selectively against employees suspected of external disclosure of information of serious financial mismanagement and misconduct,

but no action was taken in respect of the mismanagement and misconduct or the employees implicated therein.

2.3 Complaint by Mr L Mali

2.3.1 The Complainant alleged that he was being victimised by Transnet because he was suspected of disclosing confidential information about alleged irregularities within Transnet outside of the workplace. In addition, he had successfully challenged the outcome of his disciplinary process and dismissal in the TBC but Transnet allegedly unreasonably refused to implement the arbitration award with the result that he was not able to earn any income.

2.4 Mr C M Xaba

2.4.1 Mr Xaba was the former General Manager at Transnet Capital Projects and stationed at Elandsfontein. He approached the Public Protector with a complaint about the alleged unfair treatment by Transnet in the disciplinary action taken against him because he was perceived to be a supporter of Mr S Gama, Chief Executive Officer: Transnet Freight Rail, as a likely candidate to take over from Ms Maria Ramos as Chief Executive of Transnet.

2.5 Mr B Fredericks

2.5.1 Mr Fredericks is the former Chief Procurement officer at Transnet Freight Rail (TRF). He approached the Public Protector with a complaint that Transnet treated him unfairly in the course of disciplinary proceedings that were instituted against him, and his subsequent dismissal. According to Mr Fredericks he was prejudiced in the preparation for the disciplinary hearing and he was singled out for disciplinary action while no action was taken against the other people involved,

including his own manager who was responsible for oversight as Head of the Department involved.

2.6 Mr J Blose

2.6.1 Mr Blose is the former Security Manager at the Port of Durban. He approached the Public Protector with a complaint that he was treated unfairly by Transnet in the institution of disciplinary charges against him in a matter where he was not involved and where his manager had acted with the full knowledge and approval of the Chief Executive of TFR and the advice of their Legal Advisor.

2.6.2 According to Mr Blose there was no evidence adduced at the disciplinary enquiry that he had committed the misconduct with which he was charged. The chairperson of the disciplinary enquiry nonetheless found him guilty and imposed a sanction of dismissal.

2.7 Mr B Ndlovu

2.7.1 Mr B Ndlovu is the former Port Manager for the Durban Port. When he was appointed as the Port Manager, Mr Blose was the Security Manager at the Port of Durban. Mr Ndlovu approached the Public Protector with a complaint that he was unfairly treated by Transnet when charges of misconduct were brought against him for extending a contract of a service provider for security services.

2.7.2 Mr Ndlovu alleged that there were some deficiencies in the procurement process that wrongly excluded the service provider and he acted on the instructions of the Port Legal Advisor as well as with the full knowledge and approval of the Chief Executive Officer of the National Ports Authority (NPA.).

2.8 Ms B Williams

2.8.1 Ms Williams was the Procurement Manager at TFR, although the disciplinary charges against her, related to her duties as Senior Manager Procurement at Transnet Capital Projects in Woodmead. She approached the Public Protector with a complaint that she was treated unfairly by Transnet during the course of the disciplinary process.

2.8.2 Ms Williams alleged that she was found guilty despite the lack of evidence supporting the charges laid against her, and that she was also found guilty of disclosing confidential information on the basis of circumstantial evidence that did not link her to such disclosures.

2.9 Mr B Ngwenya

2.9.1 Mr Ngwenya informed the Public Protector that he was employed by the NPA, Transnet subsidiary division, based in Richards Bay Port as a Security Manager. He approached the Public Protector with a complaint that he was unfairly treated by Transnet through the institution of disciplinary action against him, and his subsequent dismissal. He stated that the disciplinary action was not initiated by his own managers but was "instigated" at the Transnet Head Office in Johannesburg, by Mr Vuyo Kgatla, who was allegedly the driving force behind this matter. Mr Kgatla reportedly made use of the services of a firm of lawyers with which he had a close relationship.

2.9.2 Mr Ngwenya also alleged that if there was any wrongdoing on his part in relation to said charges laid against him, he should have been charged together with the

Port Manager, the Procurement Manager and the Finance Manager, as they would also have been implicated

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under 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 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: *"When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or*

lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

3.4 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by legislation.

3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 Transnet, TFR and the NPA are organs of state and their conduct amounts to conduct in state affairs, as a result the matter fall within the ambit of the Public Protector's mandate.

3.7 Transnet did not dispute the Public Protector's jurisdiction to deal with the matters that are the subject of this investigation and report, but commented on the "*appropriateness of the employees to seek redress from the Public Protector, relying on section 23 of the Constitution, over a complaint about their dismissal.*"

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or

maladministration. Section 6 of the Public Protector Act gives the Public Protector the authority to resolve a matter without conducting an investigation and resolve a complaint through appropriate dispute resolution (ADR) measures such as conciliation, mediation and negotiation.

4.1.3 The Public Protector resolved to issue a provisional report on the investigation to the Chairperson of the Transnet Board as well the Chief Executive Officer of Transnet, as well as other relevant parties involved. The Provisional Report was distributed as a confidential document to provide the recipients thereof and the individuals implicated therein an opportunity to respond to its contents as envisaged in terms of section 7(9) of the Public Protector Act.

4.1.4 The process of negotiation with Transnet followed in terms of section 6 of the Public Protector Act but was not concluded as a result of leadership changes in the respective organisations, and it was therefore resolved to revert back concluding the report in terms of section 8(1) of the Public Protector Act and section 182(1)(c) of the Constitution.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amount to improper conduct or maladministration?

4.2.1.4 If there was indeed improper conduct or maladministration, what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual investigation relying on the evidence provided by the parties and independently sourced during the investigation, and making a determination on the balance of probabilities.

4.2.3 The enquiry regarding what should have happened, relates to the rules and standards that the conduct in question should have complied with, to prevent maladministration and prejudice.

4.2.4 The question regarding the remedy or remedial action seeks to redress the consequences of maladministration. Where a Complainant has suffered prejudice the intention is to place the Complainant as close as possible to where they would have been had the Department complied with the regulatory framework setting the applicable rules and standards for good administration.

4.3 On analysis of the complaint, the following issues were considered and investigated:

4.3.1 Whether Transnet as the employer improperly attempted to influence the outcome of arbitration proceedings in the TBC in its favour by endeavouring to control the appointment of arbitrators;

4.3.2 Whether Transnet or employees in its employ improperly engage in the unlawful monitoring of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s);

4.3.3 Whether Transnet improperly failed to follow due process in the disciplinary action against and subsequent dismissal of the Complainants;

4.3.4 Whether Transnet treated the Complainants unfairly by seeking to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts;

4.3.5 Whether Transnet improperly fail to reinstate the Complainant, Mr Mali, in compliance with an arbitration award in favour of the Complainant;

4.3.6 Whether Transnet treated the Complainants unfairly based on the inconsistent application of discipline by failing to act against other employees in similar instances of the same acts of alleged financial misconduct;

4.3.7 Whether Transnet improperly victimised the Complainants because of their perceived loyalty to or support of a Member of the Executive Management of Transnet who was at the time identified as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet;

4.4 Key Sources of Information

4.4.1 Documents

4.4.1.1 Documents and information submitted to the Public Protector in terms of section 8 of the PDA.

4.4.1.2 Affidavits, documents and information submitted by the Complainants.

4.4.1.3 Minutes of meetings of the Executive Committee of the TBC;

4.4.1.4 A Report dated 16 November 2011 on the outcome of a forensic investigation commissioned by Transnet Board of Directors; and

4.4.1.5 Copies of the records of some of the arbitration proceedings and the arbitration awards issued in the TBC.

4.4.2 Correspondence

4.4.2.1 Correspondence with the Chairperson of the Transnet Board, the Chief Executive Officer of Transnet, as well as the then Minister of Public Enterprises in October 2012 and January 2013;

4.4.2.2 Correspondence and communications between the individual complaints and the Chairman as well as the CEO of Transnet during October and November 2012 and January 2013.

4.4.3 Consultations and interviews

4.4.3.1 Interview with the General Secretary of the TBC, Mr Mthimkulu H. Mashiya in April 2012;

4.4.3.2 Interview with Mr Mkwanazi – Chairperson of the Transnet Board of Directors on 12 December 2012;

4.4.3.3 Interview with Mr Gama, Chief Executive of the TFR in April 2012; and

4.4.3.4 Interviews and consultations with the complainants on an ongoing basis during the course of the investigation until 2016.

4.4.4 **The Legislative Framework;**

4.4.4.1 The Constitution of the Republic of South Africa, 1996;

4.4.4.2 Protected Disclosures Act No. 26 of 2000 (the PDA);

4.4.4.3 Labour Relations Act No. 66 of 1995 (LRA); and

4.4.4.4 Promotion of the Administrative Justice Act No. 3 of 2000 (PAJA)

4.4.5 **Relevant jurisprudence**

4.4.5.1 *Gama* v *Transnet Limited and Others* (09/38956) [2009] ZAGPJHC 75 (7 October 2009);

4.4.5.2 *Woolworths (Pty) Ltd* v *CCMA & others* [2010] 5 BLLR 577 (LC);

4.4.5.3 *Bato Star Fishing (Pty)* v *Minister of Environmental Affairs & Tourism* [2004] ZACC 15; 2004 (7) BCLR 687 (CC);

4.4.5.4 *Sidumo & Another* v *Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC);

4.4.5.5 *Robinson* v *Randfontein Estates Gold Mining Co. Ltd* 1921 AD 168 at 17;

4.4.5.6 *Tek Corporation Provident Fund and Others* v *Lorentz* (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) (3 September 1999);

4.4.5.7 *In Imperial Group Pension Trust Ltd* v *Imperial Tobacco Ltd* [1991] 2 All ER 597 (ChD) at 606;

4.4.5.8 *Sedick & Another and Krisray (Pty) Ltd* (2011) 32 ILJ 752 (CCMA); Protea Technology Limited and Another v Wainer 1997 (9) BCLR 1225 (W);

4.4.5.9 *Williamson* v *Schoon* 1997 (3) SA 1053;

4.4.5.10 *The Public Protector* v *Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 June 2011);

4.4.5.11 *Grieve* v *Denel (Pty) Ltd* 2003 (24) ILJ 551 (LC);

4.4.5.12 *Communication Workers Union* v *Mobile Telephone Networks (Pty) Ltd* 2003 (24) ILJ 1670 (LC);

4.4.5.13 *Beaurain* v *Martin N.O. and Others* (C16/2012) [2014] ZALCCT 16; (2014) 35 ILJ 2443 (LC) (16 April 2014);

4.4.5.14 *Magagane* v *MTN SA (Pty) Ltd and another* (JS834/11) [2013] ZALCJHB 77 (17 May 2013);

4.4.5.15 *Radebe and Another* v *Premier, Free State and Others* (JA 61/09) [2012] ZALAC 15; 2012 (5) SA 100 (LAC) (1 June 2012);

4.4.5.16 *Mabinana and others* v *Baldwins Steel* (1999)5 BLLR 453 LAC;

4.4.5.17 *Greater Letaba Local Municipality* v *Mankgabe NO & others* [2008] 3 BLLR 229 (LC);

4.4.5.18 *SA Commercial Catering and Allied Workers Union and others* v *Irvin & Johnson* (1999)20 ILJ 2302 (LAC);

4.4.5.19 *SACCAWU & others* v *Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC);

4.4.5.20 Pharmaceutical Manufacturers Association of South Africa: In re Ex parte Application of the President of the RSA 2000 (3) BCLR 241 (CC);

4.4.5.21 *Heyneke* v *Umhlatuze Municipality* (D908/09) [2010] ZALC 57; (2010) 31 ILJ 2608 (LC) (24 March 2010);

4.4.5.22 *Fedsure Life Assurance Ltd* v *Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); and

4.4.5.23 SA Chemical Workers Union & others v Afrox Ltd (1999) 20 ILJ 1718 (LAC).

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

5.1 Regarding whether Transnet as the employer improperly attempted to influence the outcome of arbitration proceedings in the TBC in its favour by endeavouring to control the appointment of arbitrators:

Common cause issues

5.1.1 The information disclosed to the Public Protector in terms of the PDA is not in dispute and included internal e-mail communications between Transnet Human Resource (HR) officials relating to the process followed to appoint arbitrators to deal with Labour disputes in the TBC. The discussion between the HR officials is reflected verbatim hereunder:

"*Dear ...*

I am very worried by what seems to be a new pattern at the TBC: If we do not agree (on) an arbitrator the TBC proceeds to immediately appoint an arbitrator without any reference back to us on what our preference is. I am aware of the rules of the council which allows the TBC to chose (sic) an arbitrator but would

expect the TBC to at least engage (informally with us on the issue) as I think they used to do.

The cases that I am aware of and there are others that raise serious concerns:

- *... advises me that in the TRE before we could even agree an arbitrator with the unions – the TBC went ahead and appointed an arbitrator. This case is being heard tomorrow in Germiston. He said the arbitrator appointed is not the one TRE would have supported. I have ... give us the details of the case....*
- *....'s lawyers have proposed to us three arbitrators to adjudicate his dismissal disputes: two of the ones proposed by ....(M ... and N ....) have recently been appointed by the TBC to arbitrate cases, related to the ... matter where we did not agree an arbitrator with the other side (the case of Fredericks where M ... was appointed and the Mali case where M... was appointed). While this may be pure coincide (sic) it does raise questions about who is deciding on which arbitrator to appoint, what criteria are being applied and why we are not consulted or informally spoken to at all. These are clearly important cases for us and ones where you would at least expect some discussion with us as employer. It is not as though we have these high profile management cases every day.*

Given that the primary reason why we are in the bargaining council is that we have some measure of control over who is appointed to arbitrate cases, *I am very concerned by this trend. If we do not have this choice it will be cheaper for us to merely abandon the council and allow the CCMA to appoint (and pay the arbitrators) – as in any event we are having only CCMA commissioners appointed to hear our cases.*

I would be grateful if you could as a matter of urgency find out who in the TBC approved the appointment of M... and N... and on what basis. I would like you to find out as much information as possible on these two cases. Please advise.

Furthermore I think we need to put on the agenda of the next TBC Exco (for decision at the next AGM) how we use Tokiso. As the TBC we pay Tokiso to process our disputes but they do not do our case management. ***I am questioning***

whether we would experience the same level of interference as appears to be taking place if the TBC case management and appointment of arbitrators was managed by Tokiso. *It may also reduce costs substantially. I have set up a meeting with.... from Tokiso for Monday next week where we can get further information on this issue. Please can you in the interim work out what it is costing the TBC currently to manage the cases with the existing staff etc. so that we have a sense of the operating costs of the TBC internally processing disputes.*
Finally, we need to meet with M.... I have tried to set up a meeting with him.... Please will you follow up on this issue and secure a meeting time..., as we never had these types of problems with Calvin Paul..."
(Emphasis added)

5.1.2 It is common cause that Ms Sue Albertyn, General Manager of Group Employee Relations, and Mr Manasse Matau, Executive Manager in Group Employee Relations, who is also the chairman of the EXCO of the Transnet Bargaining Council, met with Mr Mashiya, the General Secretary of the TBC on 1 October 2010.

5.1.3 The meeting was initiated by Transnet for the specific purpose of raising with the Secretary of the TBC a number of concerns regarding the functioning of the TBC including the allocation of arbitrators. These concerns related to the appointment of a particular arbitrator to high profile arbitration under apparently dubious circumstances.

5.1.4 On 14 December 2010, the TBC EXCO discussed the question of how the allocation of arbitrations to particular arbitrators was being managed and resolved to appoint Price Water Coopers, an auditing firm, to conduct an audit of TBC practices including the allocation of cases.

5.1.5 In preparation for the audit and in order to curtail unnecessary costs, Mr Mashiya extracted information from their records on the appointment of panelists, reflecting the case number, the parties, the panelist, whether the panelist was appointed by agreement of the parties or was appointed by the Secretary, as well as the outcome of the case.

5.1.6 The information reflected the following:

a) Out of 135 new arbitration cases in 2010, the panelists were appointed by agreement of the parties in 48 cases and the rest were appointed by the Secretary.

b) In the 87 cases where the panelist was appointed by the Secretary, 48 (55%) were decided in favour of the employer, 26 (29, 9%) in favour of the employee, and 13 (14, 9%) were settled by agreement of the parties.

c) In the 48 arbitrations where the panelist was appointed by agreement of the parties, 27 (56, 3%) were ruled in favour of the employer, 16 (33, 3%) in favour of the employee, and 5 (10, 4%) were concluded by way of settlement agreement.

d) In aggregate terms, out of the 135 arbitrations, 75 (55, 6%) were in favour of the employer while 42 (31, 1%) went the way of the employee and 18(13, 3%) (including one withdrawn matter) were settled by agreement.

Appointment of Panelist	**Rulings in favour of the Employer**	**Rulings in favour of the Employee**	**Concluded by settlement agreement**
By Secretary	**48 (55, 2%)**	**26 (29, 9%)**	**13 (14, 9%)**
By Agreement	**27 (56, 3%)**	**16 (33, 3%)**	**5 (10, 4%)**

TOTAL	**75 (55, 6%)**	**42 (31, 1%)**	**18(13, 3%)**

5.1.7 Mr Mashiya presented a written report on the appointment of panellists to the EXCO of the TBC during a meeting in March 2011. The meeting discussed the concerns that were raised in respect of the appointments. The information indicated that there was no difference in the trends and outcomes between cases where the panellists were appointed by agreement of the parties and those instances where the panellists were appointed by the Secretary.

5.1.8 The meeting agreed that there was no need for an audit to continue.

Issues in dispute

5.1.9 It is dispute that Transnet endeavoured to manipulate the appointment of arbitrators in the TBC in its favour. Evidence and information was obtained from Transnet as well as Mr M M Mashiya, General Secretary of the TBC.

5.1.10 As far as the particular arbitration mentioned in the e-mails is concerned, Transnet stated that it and the employee's legal representative could not agree upon an arbitrator and approached the TBC to appoint an arbitrator from the TBC panel of arbitrators. Transnet wanted to understand why the particular arbitrator had been appointed. As the employer party in the TBC, Transnet is of the view that it carries a responsibility to ensure that the administration of disputes by the bargaining council accords with the principles of the Labour Relations Act. There have been informal discussions in the labour law fraternity over concerns that particular labour arbitrators solicit work and Transnet would not want these practices perpetuated in the TBC.

5.1.11 Transnet further advised the Public Protector that upon enquiry to the TBC as to how it came to be that the particular arbitrator was appointed, information came to light that created an impression that the TBC employee had herself engineered that the arbitrator in question be assigned to hear the matter, and for some unknown reason misrepresented the process followed. This raised serious concerns of wrongdoing in the appointment process.

5.1.12 Transnet submitted further that as the Secretary of the TBC it is responsible for appointing an arbitrator in the absence of agreement between the parties. Mr Matau and Ms Albertyn met with Mr Mashiya, the Secretary of the TBC on this matter and shared their concerns. Mr Mashiya was requested to further investigate the issue and take appropriate action against the employee who had given a false explanation about the assignment. He reportedly undertook "*to be more watchful around the allocation of arbitrations.*"

5.1.13 Transnet also states that it had requested a full investigation into the assignment of arbitrators by the TBC -in particular, to determine whether there was a trend of bias by the TBC towards particular arbitrators.

5.1.14 According to Transnet one of the important consequences of being a party to a bargaining council is "*that it provides the parties to a dispute with the ability to agree on an arbitrator of their choice."* It is one of the key differences between having disputes determined by the CCMA, where the parties are not able to agree upon their arbitrator, and having disputes resolved under the auspices of a bargaining council, where the parties "*are free to determine the rules that should govern the appointment of arbitrators and, in terms of the rules agreed in the TBC, the parties have an opportunity to agree the arbitrator. This is one of the reasons that Transnet remains part of the Transnet Bargaining Council.*"

5.1.15 Transnet asked Tokiso and the Secretary of the bargaining council to provide an analysis of arbitrations conducted in 2010, including details of whether any particular pattern emerged in how arbitrations were being allocated.

5.1.16 While Transnet is of the view that it is entitled to be consulted on the appropriateness of a particular arbitrator's appointment having regard to a number of factors including the complexity and expected duration of a particular matter and/or seniority of the parties/employees concerned, it accepted the appointment of the arbitrators in the above matters even though it was not consulted. However, Transnet insists that for the parties to the TBC it would, by way of example, be inappropriate to appoint a relatively inexperienced junior arbitrator to preside over a particularly complex or high profile matter or to appoint an arbitrator who had previously presided over a related matter based upon a common set of facts or circumstances. These factors would not ordinarily fall within the knowledge of the TBC.

5.1.17 In addition, where the initial attempt to agree an arbitrator has been unsuccessful, it remains appropriate for the bargaining council, in accordance with established practice, to check with both sides that there is no serious objection to the arbitrator that it then proposes to appoint. Transnet stated that it had never contended for preferential rights over the employee parties to disputes in this regard, and none of the facts referred to in the provisions report could sensibly be interpreted as evidence of it doing so.

5.1.18 Transnet concluded that-

"It has become evident to Transnet, the employer party in the TBC, who has and is expected to have a vested interest in the proper management of the TBC, that the management of the appointment of arbitrators can be improved Transnet has accordingly, just as labour is entitled to do, been insisting on more transparency and tighter controls in the appointment of both conciliators and arbitrators appointed to resolve disputes. Transnet believes that the parties to the bargaining council should insist that the agreed procedures are correctly followed, and that the TBC has an obligation to investigate possible abuses of the process of appointing arbitrators."

Application of the relevant law

5.1.19 In terms of the Constitution of the TBC (The Collective Agreement on Rules Governing Conciliating and Arbitrating Disputes in the Transnet Bargaining Council), the parties are required to agree on an arbitrator (Rule 22.2.1) and it the parties cannot agree on a particular arbitrator, the Secretary of the TBC appoints an arbitrator (Rule 22.2.2). These rules are jointly agreed between the employer and labour and expressly establish the procedure to be followed in appointing arbitrators.

5.1.20 In practice the TBC panel of arbitrators is agreed annually between Transnet and its two recognized labour unions, being SATAWU and UTATU SARWHU. The panellists range in in terms of daily rates, seniority and whether or not they are certified by the CCMA;

5.1.21 The TBC circulates a list of Tokiso panellists who are available on suitable dates for the arbitration. The employer party, Transnet and the employee party each

nominate three preferred arbitrators with a view to agreeing upon the arbitrator selected. It is a commonly accepted practice of labour law that agreement on an arbitrator lends legitimacy to the arbitrator appointed. Only if the parties cannot agree upon an arbitrator does the Secretary of the TBC appoint an arbitrator who may not be from amongst the nominated list.

5.1.22 The evidence further shows that Transnet's concerns were dealt with by the EXCO of the TBC, and after consideration of the Secretary's report on the trends and outcomes of arbitrations *vis-a-vis* the method of appointment of the arbitrator, the audit was abandoned.

5.1.23 It does not however clarify the tone and content of the internal communications that were disclosed to the Public Protector, and which reflected that Transnet or the service provider that was engaged for the purpose of the planned audit, were actually monitoring private communications of certain individuals, relating to the appointment process of arbitrators. It also did not address the statement to the effect that the relevant managers were concerned that where there was no agreement between the parties on the choice or identity of an arbitrator, the TBC was still expected to revert back to Transnet on what their preference would have been.

5.1.24 The Transnet Bargaining Council is a 1 (one) Employer Party Bargaining Council which covers approximately 55 000 employees who are employed by the divisions, business units, undertakings and industries of Transnet in the Republic of South Africa. This includes Transnet Freight Rail, Transnet Rail Engineering, Transnet Port Terminals, Transnet National Ports Authority, Transnet Pipelines

as well as business units such as Transnet Capital Projects, Transnet Corporate Centre and Transnet Heritage Foundation.[1]

5.1.25 The parties to the TBC comprise of Transnet and the following trade unions:-

a) South African Transport and Allied Workers Union (SATAWU);
b) United Association of South Africa (UASA)
c) United Transport and Allied Trade Union (UTATU).

5.1.26 In terms of the Constitution of the TBC, its functions are to, inter alia:-

a) "*negotiate, to bargain collectively, to conclude collective agreements and to consult on issues which affect or may affect the relationship between the parties;*
b) …
c) …
d) … *maintain and enhance industrial peace;*
e) *endeavour to prevent disputes from arising, the negotiation and conclusion of agreements on substantive issues of employment and procedures;*
f) *endeavour to settle disputes which have arisen or may arise in the industry;*
g) *conclude, administer, supervise, publish and enforce the agreements of the Council;*
h) *perform the dispute resolutions functions referred to in section 51 of the Act;*

[1] http://www.tbc.co.za/wmenu.php

i) consider matters relating to the relationship between the parties and give advice in connection therewith; ...

j) consider and deal with any other matters that may be of interest to the parties; ...

k) manage the administration of the Council including its finances, co-ordination of chambers and asset management;

l) ***Manage the dispute resolution functions of the Council, including the administration of the dispute resolution system and the appointment of conciliators and arbitrators..."*** (own emphasis)

5.1.27 There is general consensus that appointment as arbitrator does not carry with it any obligations to the nominating or appointing party except the generally-accepted obligations of all arbitrators of ensuring (i) that (where provided for) an appropriate chair/presiding arbitrator is selected and (ii) that the parties' arguments are given a fair hearing – this is wholly different from arguing a party's case. Arbitration under the LRA must be fair and equitable; the arbitrator must be impartial and unbiased; the arbitrator must have jurisdiction and not exceed his or her powers; the decision must be consistent with the Act and the Constitution; and the award must be justifiable in relation to the information placed before the arbitrator and the reasons given for it.[2]

5.1.28 One of the principal functions of a party-appointed arbitrator, according to Professor Andreas Lowenfeld, *"is to give confidence in the process to the parties and their counsel, some basis for that confidence needs to be established. Sometimes that confidence can be based on mutual acquaintances, without direct*

2 **Woolworths (Pty) Ltd v CCMA & others** [2010] 5 BLLR 577 **(LC)** *see Bato Star Fishing (Pty) v Minister of Environmental Affairs & Tourism* [2004] ZACC 15; 2004 (7) BCLR 687 *(CC); Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC)*

personal contact; some potential arbitrators become well-known through published writings, lectures, committee work or public office. Others are not so well-known and ... lawyers or clients or both want to have a first-hand look. ... However, some restraint should be shown by both sides. ... [3]

5.1.29 It is also reasonable for a party representative to have an opportunity to assess the candidate's suitability to preside over an arbitration process. However, it is an accepted principle that there should be no probing of the prospective arbitrator's views on the merits of the case, nor should party representatives take the opportunity to test their forthcoming submissions of fact and law. According to some writers[4] the contacts between parties and prospective co-arbitrators are important to the arbitration process and, with appropriate safeguards (including disclosure as to their existence and equal opportunities for both parties to have such contacts) do not undermine or taint that process.

5.1.30 These matters can (and should) be explored through other means (such as publicly available records of past cases and inquiries with others in the arbitration community). *Mark Friedman*[5] made the following comments as guidelines:

"It is generally considered permissible to explore a prospective arbitrator's suitability, but not to engage him on the merits of the particular dispute; it is permissible to learn about the arbitrator's approach and perhaps predispositions, but not to compromise his impartiality and willingness to decide based on the arguments and evidence….

3 Professor Andreas Lowenfeld, "The Party-Appointed Arbitrator: Some Reflections", 30 Tex. Int'l L.J. 59

4 N Blackaby and C Partasides, A Redfern & M Hunter, Law & Practice of International Commercial Arbitration, 5th ed 2009 says at paras 4.69-4.70:

5 *"Regulating Judgment: A Comment on the Chartered Institute of Arbitrators Guidelines on the interviewing of Prospective Arbitrators" *2008+ Dispute Resolution International* 288

5.1.31 In addition to these there is also a general obligation and duty of an employer to act with "*care, skill and diligence and in good faith*"[6] towards an employee" In confirming the duty of good faith owed by an employer, Judge Navsa[7] has echoed the views of Nicholas-Browne V C Nicholas-Browne V C [8] in which he said:

"*In every contract of employment there is an implied term ...that the employers will not, without reasonable and just cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. I will call this implied term 'the implied obligation of good faith'.*

5.1.32 In terms of section 9(1) of the Constitution everyone, including employees, have the right to equality before the law and to equal protection and benefit of the law. Section 34 of the Constitution provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before impartial tribunal or forum.

Conclusion

5.1.33 Transnet's efforts to ensure that it has the deciding vote or final say in the appointment of arbitrators in the TBC, contrary to the processes provided for, can be construed as attempts to undermine the relevant dispute resolution Rules and processes of the TBC aimed at safeguarding the impartiality of arbitrators and ensuring that both parties enjoy equal protection and benefit of the law. Transnet's

6 In Robinson v Randfontein Estates Gold Mining Co. Ltd 1921 AD 168 at 177

7 Tek Corporation Provident Fund and Others v Lorentz (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) (3 September 1999.

8 In Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597 (ChD) at 606.

conduct fall foul of the spirit of the law as embodied in sections 9(1) and 34 of the Constitution

5.2 Regarding whether Transnet or employees in its employment improperly engaged in the unlawful monitoring of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s):

Common cause issues

5.2.1 Transnet did not dispute the existence of the e-mail communication between Transnet Human Resource (HR) officials or its contents disclosed to the Public Protector in terms of the PDA , included the following discussion between the officials:

"Dear...

What I forgot to mention tonight is the discussion with..... today re the TBC audit after your talk with them last night, is that they do an analysis of the frequency and timing of calls between ... and ...., and recent activity re arbitrators M... and N.... My concern there though is that ***they have become aware through this investigation process that we have been monitoring such activity for past few months and they are wise to it and are communicating via other means that are not as easily traceable.*** *I think it is still worth the exercise though."* (Emphasis added)

Issues in dispute

5.2.2 It is in dispute that Transnet was allowed to monitor of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s).

5.2.3 Transnet submitted that it is entitled to investigate and monitor employee communications taking place during working hours where company equipment, such as computers or cell phones are utilized. All Transnet employees are aware of the employer's right to do so, in terms of existing Transnet policies and in terms of their contract of employment. Transnet exercises this right when there is a reasonable apprehension of fraudulent activities taking place.

5.2.4 According to Transnet its standard contract of employment for management employees makes it clear that employees use Transnet property and consent to Transnet accessing such property, where appropriate. The standard clause reads as follows:

TELEPHONE, EMAIL AND ELECTRONIC COMMUNICATIONS

Transnet will honour the right to privacy to the fullest extent possible. It may, however, happen on occasion that interception, monitoring, etc., as contemplated by the Regulation of Interception of Communications and Provision of Communication-related Information Act, may be required for reasons relating to the network infrastructure, to ensure protection of Transnet's intellectual capital, detection of suspected wrong-doing or abuse and the like.

The Employee agrees that electronic communications sent or received by him/her may be monitored by Transnet and that his/her continued use of Transnet's communication systems may be monitored and intercepted, as and when required, in the circumstances contemplated by the law.

5.2.5 Transnet submitted that "*the single email … simply does not support any finding of a breach of this policy or any other principle of law.*"

Application of the relevant law

5.2.6 The Regulation of Interception of Communications and Provision of Communication-Related Information Act 70 of 2002 ("RICA") distinguishes between participant surveillance, and unlawful interceptions i.e. where the person intercepting the information is not a party to the communication and surveillance of the communication is undertaken without either party's consent.[9]

5.2.7 In terms of section 6 of RICA an employer may intercept and monitor its employees' communications made via telecommunication systems provided by the employer such as work phones, cell phones, computers, email, internet etc, but only if the employer had good reason to intercept or monitor the communications on reasonable grounds for a suspicion of an offence or improper use of the telecommunications system. In *Sugren and Standard Bank of SA (2002) 23 ILJ 1319 (CCMA)* the court noted that telephone and email facilities **provided by the employer** are *'legitimate areas of interest to the employer where it suspects that the employee is guilty of misconduct'*.

5.2.8 In the matter at hand there is no evidence that Transnet was legitimately pursuing suspicions of misconduct on the part of the employee whose communications were monitored and intercepted by Transnet as the disciplinary proceedings against the employee in question, Mr S Gama had in fact been concluded. Furthermore, Transnet did not provide evidence that the cellular or telephones used by Mr Gama was part of communication facilities that had been provided by Transnet, or that it only involved Transnet employees.

9 Social Networking and Labour Law, http://www.webberwentzel.com/wwb/view/wwb/en/page31479

5.2.9 Instances where an employer intercepts the communications of an employee without the consent of the employee or obtain information through the unlawful monitoring or surveillance of the employee, would have serious implications not only in terms of the right to privacy provided for in section 14 of the Constitution, but also as a threat to the reciprocal duty of good faith between employer and employee.[10]

Conclusion

5.2.10 The conduct of Transnet to monitor private communications regarding the appointment of an arbitrator relating to the matter of Mr Gama, without the consent of the employee or endeavour to obtain information through the unlawful monitoring or surveillance of the employee, suggested that Transnet went beyond what could be reasonably regarded as exploring the suitability of arbitrators, in total disregard for the privacy of the parties involved and its duty of good faith.

5.3 Regarding whether Transnet improperly failed to follow due process in the disciplinary action against and subsequent dismissal of the Complainants:

Common cause issues

5.3.1 Mr Mali

5.3.1.1 It is common cause that Transnet instituted disciplinary action against Mr Mali in relation to an article which appeared in the *Business Report* in November 2009,

10 *Sedick & Another and Krisray (Pty) Ltd (2011) 32 ILJ 752 (CCMA); Protea Technology Limited and Another v Wainer* 1997 (9) BCLR 1225 (W).

accusing Transnet of a R5,4 billion cover-up of overspending on its capital expansion programs, particularly at TCP. Emails containing confidential information relating to Transnet were attached to this article. The information disclosed was confidential to Transnet and its disclosure constituted a breach of the employment contract entered into with managerial level employees, as well as of the Transnet Code of Ethics.

5.3.1.2 Transnet instituted disciplinary action against Mr Mali in January 2010 and he was suspended on 28 January 2010. On the 9 and 17 February 2010 and 11 March 2010, he appeared at the disciplinary enquiry Chaired by Advocate Mark Antrobus SC an independent Senior Counsel from the Johannesburg Bar.

5.3.1.3 Mr Mali was subsequently found guilty of the misconduct with which he was charged and for breaching the Transnet Code of Ethics. The presiding officer's recommended sanction was summary dismissal. He was dismissed on 20 April 2010.

5.3.1.4 Following his dismissal, Mr Mali referred an unfair dismissal dispute to arbitration under the auspices of the TX. Mr Russell Moletsane was appointed as arbitrator. The arbitration hearing took place on 28 June and 17 August 2010.Mr Mali referred the matter to the TBC on the 29 of April 2010. The arbitration proceedings took place on 28 and 29 June 2010 and were concluded on 17 August 2010.

5.3.1.5 The arbitrator found that the dismissal was substantively unfair. He ordered re-instatement with retrospective effect to the date of dismissal, on terms and conditions no less favourable than those applicable at the time of his dismissal and without forfeiture of any benefits which would have accrued to Mr Mali but for the unfair dismissal. He also ordered that Mr Mali be back-paid a sum of R250 000-00 by no later than 30 September 2010.

5.3.1.6 Following the outcome of the arbitration hearing Transnet took the matter on review to the Labour Court but also engaged with Mr Mali's lawyers on settlement proposals prior to the Labour Court handing down of judgment in the review application.

5.3.1.7 The review application was heard on 10 February 2012, where both parties were represented by counsel. Judgment in the matter was handed down on 3 May 2012. The Court found in favour of Transnet, holding that the TBC panellist, Mr. Moletsane's award was not one a reasonable decision maker would have made and substituted that decision with the following court order:

"The arbitration award under reference number BC. MALI/TCP (Projects) CR4/i0862 dated J7 September2010 is reviewed and set aside;
The decision of Mr. Moletsane is substituted with a finding that the dismissal of Mr. Mall was substantively fair."

5.3.2 Mr B Fredericks

5.3.2.1 Mr Fredericks was suspended on 1 February 2010, and following the finalisation of the investigation, received a notice to attend a disciplinary hearing on 1 March 2010. On 23 March 2010, following an internal disciplinary hearing chaired by an external and independent presiding officer, Adv. Nazeer Cassim SC, and at which Mr. Fredericks was represented by Adv. Sam Cohen, Mr Fredericks was found guilty and dismissed:

5.3.2.2 Adv. Cassim reached the conclusion that in the circumstances, the only appropriate sanction would be dismissal.

5.3.2.3 Mr. Fredericks thereafter referred an unfair dismissal dispute to the TBC on 19 April 2010, claiming that his dismissal was both procedurally and substantively unfair. The matter was adjudicated by Tokiso panellist, Dr A Gildenhuys over three (3) days from 2 to 4 August 2010. Mr Fredericks was legally represented by both an advocate and an attorney at the disciplinary and arbitration hearings and Transnet was represented by an attorney. On 15 July 2010, Mr Fredericks attended the pre-arbitration conference at Bowman Gilfillan's office in Sandton. He stated that Transnet's attorney's refused to accept the pre-arbitration minutes, which meant the common cause issues had to be revisited at the arbitration.

5.3.2.4 The arbitration hearing took place on 2 to 4 August 2010 and the arbitrator found the dismissal of Mr Fredericks to be substantively and procedurally fair.

5.3.3 Ms B Williams

5.3.3.1 It is common cause that Ms Williams was the Procurement Manager at TFR, (although the disciplinary charges against her related to her duties as Senior Manager Procurement at Transnet Capital Projects in Woodmead). On 12 March 2010, she was suspended and charged with misconduct:

5.3.3.2 On 30 March 2010, Adv. Sirkhot found Ms. Williams guilty on both charges and recommended that she be summarily dismissed, which was duly done on 1 April 2010.

Issues in dispute

5.3.4 It is in dispute that Transnet failed to follow due disciplinary procedures by conducting the disciplinary processes against the Complainants. In addition, Transnet submitted that it would not be proper for the Public Protector to adjudicate the complaints relating to the fairness of the disciplinary action and the dismissal of the Complainants.

5.3.5 Dismissal of Mr Mali

5.3.5.1 Advocate Mark Antrobus SC an independent Senior Counsel from the Johannesburg Bar, was appointed by Transnet to chair the internal disciplinary hearing convened against Mr Mali.

5.3.5.2 Adv. Antrobus found that:

a) On the evidence there are only two sources from which the offending email which was disclosed to the press could have originated, namely (a) Mr Mali's computer where the final version of the email was created with the insertion of his comments; and (b) Mr Bush's computer, to which Mr Mali sent that email;

b) Mr Mali did not suggest any other sources; and

c) The printer records obtained from the printing system at TCP are decisive on the probabilities as they confirm Mr Bush's version that he did not print out a hardcopy of the email from his computer, whereas the same is not true in relation to Mr Mali's version.

5.3.5.3 Mr Mali submitted that that the decision to dismiss him was very harsh taking into consideration the kind of contribution that he had made to the company in 11 years of service and that he had a clean disciplinary record.

5.3.5.4 Following his dismissal, Mr Mali referred an unfair dismissal dispute to arbitration under the auspices of the TX. Mr Russell Moletsane was appointed as arbitrator. and found that the dismissal was substantively unfair. He ordered re-instatement with retrospective effect to the date of dismissal, on terms and conditions no less favourable than those applicable at the time of his dismissal and without forfeiture of any benefits which would have accrued to Mr Mali but for the unfair dismissal. He also ordered that Mr Mali be back-paid a sum of R250 000-00 by no later than 30 September 2010.

5.3.5.5 Following the outcome of the arbitration hearing Transnet stated that it decided to take the matter on review to the labour court. Mr Mali subsequently wrote to the (new) Chief Executive Officer of Transnet, Mr B Molefe to seek his intervention on the basis that he was successful in the arbitration proceedings, and that he was being severely prejudiced in that he was left without any income while Transnet pursued the review of the matter despite the findings of complete lack of evidence by the arbitrator.

5.3.5.6 Mr Mali and Transnet engaged in negotiations on a possible settlement but could not reach an agreement as Mr Mali's financial expectations were in Transnet's view not reasonable and "*were in no way relative to Transnet's maximum potential liability in the matter, and were accordingly rejected by Transnet.*"

5.3.5.7 Mr Mali advised that he too, was unable to agree to the terms proposed by Transnet as it would have put him in a far worse position than what was ordered

in his favour in the arbitration award, which Transnet was, in his view, supposed to implement pending the review proceedings in the Labour Court.

5.3.5.8 In the interim, Mr Mali approached the CCMA to have the arbitration award made an order of court (allegedly without notice to Transnet) and organised that the Sheriff of the Court attach property of Transnet at 15h00 on a Friday afternoon. Transnet stated that it was accordingly compelled to bring an urgent interdict against this action which was heard on 22 October 2010 before the Labour Court. The Court granted the relief sought by Transnet and ordered that:

a) the enforcement of the arbitration award was stayed;

5.3.5.9 The review application was heard on 10 February 2012, where both parties were represented by counsel. Judgment in the matter was handed down on 3 May 2012. The Court found in favour of Transnet.

5.3.6 Dismissal of Mr B Fredericks

5.3.6.1 Mr Fredericks is the former Chief Procurement Officer at Transnet Freight Rail (TRF). According to Mr Fredericks Transnet treated him unfairly in the course of disciplinary proceedings that were instituted against him, and his subsequent dismissal.

5.3.6.2 On 27 May 2009, he sent an email with Excel attachments to some of the EXCO members in TFR to "warn them" of a damning Ernst and Young (E&Y) audit report that highlighted approximately R5,4bn overspend on the Oreline projects using TFR capital funds and "that there could be a possible cover-up". The information

was sent to him confidentially, and he highlighted that this mail was "NOT PUBLIC KNOWLEDGE".

5.3.6.3 On 27 November 2009, an article was published in the Business Report headlining "*Transnet accused of R5, 4bn cover-up*". Transnet issued a statement in the press and an internal memorandum to its employees warning them that disclosure of confidential company information to the media is an offence and employees will be severely dealt with.

5.3.6.4 On 3rd December 2009 he was called for a meeting with his immediate manager, Mr Nick Thomson, who informed him that he was under investigation for misconduct. He was suspended on 29 January 2009 and subsequently charged with misconduct.

5.3.6.5 According to Mr Fredericks he was prejudiced in the preparation for the disciplinary hearing by Transnet's refusal to:

a) provide his lawyers with all the information they requested to prepare for his defense;

b) change the presiding officer, Adv N Cassim SC, whom his counsel felt would be biased because he also presided over another case related to the matter that was the subject of the disciplinary action against him; and

c) postpone the dates in order to give them more time to prepare their defense.

5.3.6.6 Transnet stated that Mr Fredericks' position as Chief Procurement Officer ("CPO") at Transnet Freight Rail (TFR) meant that he occupied and was remunerated at

an executive level, which position obligated him to act with due diligence and care in accordance with the provisions of the Public Finance Management Act ("PFMA'), and more importantly designated him as the custodian of Transnet's procurement policies and procedures at TFR.

5.3.6.7 It was established following an investigation initiated during late 2009, and arising out of the investigation into the award of a TFR security contract to General Nyanda Security Services ("GNS"), that Mr Fredericks had failed in this capacity, to exercise appropriate oversight of this contract. Mr Frederick also failed to ensure that procurement processes at TFR were undertaken in an appropriate manner

5.3.6.8 The disciplinary hearing was chaired by Adv. Cassim who found that in the circumstances, the only appropriate sanction would be dismissal.

5.3.6.9 Mr. Fredericks thereafter referred an unfair dismissal dispute to the TBC on 19 April 2010, claiming that his dismissal was both procedurally and substantively unfair. The matter was adjudicated by Tokiso panellist, Dr A Gildenhuys. Mr Fredericks was legally represented by both an advocate and an attorney at the disciplinary and arbitration hearings and Transnet was represented by an attorney.

5.3.6.10 The arbitration hearing took place on 2 to 4 August 2010. Mr Fredericks stated that Transnet again failed to call in the witnesses that they had requested, including Abdool Lutchka, Arthur Branford and Nick Thomson, who were key to the allegations. Instead, Transnet allegedly brought in witnesses from the Group Office (Pradeep Maharaj, Garry Pita and Anoj Singh) to discredit him and show the arbitrator that he was "not wanted back at Transnet." According to Mr Fredericks this had clearly swung the chairperson's views to his disadvantage.

Mr Fredericks also noticed that there may have been something of a relationship between the attorney for Transnet and the Chairperson.

The Arbitrator, Dr Gildenhuys found the dismissal of Mr Fredericks to be substantively and procedurally fair. Transnet reiterated that Mr Fredericks conceded under cross-examination that he was aware Mr Mncube was involved with Enterprise Development during his- employment with Transnet and in fact was part of a group of employees (task team) involved with ED.

5.3.6.11 Transnet accordingly submitted that the arbitration award which upheld Mr Fredericks' dismissal and deemed it to have been both procedurally and substantively fair is reasoned and unassailable.

5.3.6.12 Mr Fredericks advised that since he was unable to fund a review process in the Labour court he decided to write a letter to the New Transnet GCE, Mr. Brian Molefe on 31 August 2011 with a request to review the matter on the basis that:

a) No evidence of fraud and corruption were found during the intense investigation;

b) Some of the findings (of the investigation) confirmed mistakes and some could to some degree, be attributed to Mr Frederick's negligence, but it was contended that more people should then have been dismissed on the same basis; and

c) If the information was true that R8,3 billion or R5,4 billion was overspent and incurred outside the Transnet governance policies and procedures, it is unclear why no action was taken against the people involved, including Mr Frederick's own manager as person responsible for the oversight as Head of the Department involved.

5.3.7 Dismissal of Ms B Williams

5.3.7.1 Ms Williams disputed the fairness of the disciplinary process. She stated that she was served with a "Notice *to Attend a Disciplinary Hearing*" on 12 March 2010 and was expected to respond by 12:00 on 18 March 2010. She contested the date set for the pre-hearing meeting, citing insufficient time to understand the charges laid and to prepare for the process. Transnet attorneys were requested to provide copies of all documents that might be relevant to the issues in the hearing.

5.3.7.2 Such documents were only received electronically at 17.30p.m on 18 March 2010. Ms Williams again requested Transnet and their attorneys, Bowman and Gillfillan, to extend the hearing date of 23 March 2010 since 21 March 2010 was a public holiday. Both requests were denied, despite Transnet's policy which reportedly stated that 14 working days shall be made available prior to the hearing. Ms Williams also stated that she did not have access to information that she needed on her laptop since this was Transnet property and the equipment could not be made available to her.

5.3.7.3 Ms Williams alleged that she was found guilty despite the lack of evidence of the charges against her and she was also found guilty of disclosing confidential information on circumstantial evidence that did not link her to such disclosures.

5.3.7.4 Transnet, in turn, disputed any contention that Ms Williams was treated unfairly during the Disciplinary process or subjected to detrimental action for having made protected disclosures.

5.3.7.5 Transnet confirmed that Ms. Williams was dismissed following an internal disciplinary hearing chaired by an independent external presiding officer, Adv. Imtiaz Sirkhot for charges relating to failure to disclose previous material employment history and for the disclosure of confidential information relating to audit findings on the ore line whilst still employed at TCP. Ms Williams challenged her dismissal at the TBC. The arbitration was chaired by Tokiso Panellist, Mr Mzungulu Mtombeni who was appointed by the TEC. Ms. Williams was represented by an advocate at the disciplinary and arbitration hearings and Transnet was represented by an attorney. Ms Williams' dismissal was upheld as both procedurally and substantively fair.

5.3.7.6 Transnet further reiterated that at no stage during the internal disciplinary hearing or the TBC arbitration did Ms Williams or her legal representatives admit to and plead that her disclosure of the said confidential information amounted to a protected disclosure within the meaning of the PDA. On the contrary, Transnet stated that Ms. Williams had at all material times denied making any such disclosure. It was accordingly Transnet's considered view that Ms. Williams' conduct does not fail within the ambit of the PDA as alleged.

5.3.7.7 Ms. Williams referred an unfair dismissal dispute to the TBC. The TBC unilaterally appointed an arbitrator, Mr Mzungulu Mthombeni without affording the parties an opportunity to nominate preferred arbitrators or agree thereon. Nevertheless, the arbitrator, Mr. Mthombeni, found the dismissal of Ms. Williams to have been fair, agreed that she was guilty in all respects, and that Ms. Williams was shown to be dishonest.

5.3.7.8 Ms. Williams did attempt to take the matter on review to the Labour Court as she was entitled to. She however brought the matter outside the statutory time period

for doing so, failed to lodge an application for condonation, and has not pursued the matter since then.

5.3.7.9 Transnet concluded that this dispute, too, has therefor been finally determined under the appropriate constitutionally mandated process that gives effect to the employee's rights under section 23 of the Constitution.

Application of the relevant law

5.3.8 Transnet submitted that it would not be proper for the Public Protector to adjudicate the complaints relating to the fairness of the disciplinary action and the dismissal of the Complainants. Its contention is based on two grounds:

a) Where constitutional rights are conferred or regulated by a statute (such as the LRA) their rights must be pursued under those statutes and not directly under the constitution.

b) It stated that the Labour Court has determined that the Complainants were fairly dismissed and that "*it would be wrong in law to seek to circumvent those decisions of the constitutionally mandated court of law, through (the Public Protector)*" as "*... the proposed action would subvert the rule of law.*"

5.3.9 Transnet submitted that it has been made clear in a number of decisions of our highest courts that where constitutional rights are conferred or regulated by a statute (such as the LRA) their rights must be pursued under those statutes and

not directly under the constitution. The LRA confers extensive rights and protections on employees, which they are entitled to assert using the procedures and pursuing the remedies provided for in that Act.

5.3.10 The statutory protections include declaring automatically unfair any dismissal that contravenes the PDA (LRA section 187(1)(h)); and declaring any other act or omission that involves an occupational detriment under the PDA to be an unfair labour practice (LRA section 186(2)(d). According to the opinion advanced by Transnet "*these provisions give effect in the LRA to the provisions of section 4(2) of the PDA, which specifically require that any dispute about a dismissal that is in breach of the PDA must follow the procedure set out in Chapter VIII of the LRA*." This inter-relationship between these two statues is specifically intended to prevent multiple sources of adjudication over a dismissal. In addition, the LRA expressly provides (in section 210) that it takes precedence over other laws where there is any conflict.

5.3.11 Transnet contended that the matter serves as an example "to demonstrate that this is so". It stated that the Labour Court, acting on powers that are properly conferred on it by the LRA, has set aside the decision of the arbitrator on grounds established in law, and has determined that the Complainants were fairly dismissed. Transnet reiterated that the Complainants in question have not sought to challenge the decision of the Labour Court on appeal.

5.3.12 In considering Transnet's submissions on the Public Protector's decision to proceed with the investigation of the matters that are the subject of this report, the Public Protector emphasises that the Public Protector Act is a law in its own right and so is section 182 of the Constitution. When people choose the Public Protector avenue for vindicating their rights they make a choice of law. In this regard it is worth noting that the Public Protector is an appropriate forum for

resolving disputes as envisaged in section 34 of the Constitution, although it is a forum whose jurisdiction is limited to disputes arising in state affairs. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 among others, recognises the Public Protector as an alternative forum.

5.3.13 The Public Protector derives his/her mandate and powers from the Constitution, as the supreme law of the Country and legislation such as the Public Protector Act and, indeed, the PDA which reinforces and strengthens the right to make disclosures to specified bodies including the Public Protector and the Auditor-General. The law provides the Public Protector with a discretion to accept complaints that fall within her mandate. Government or organs of state cannot accordingly force people to subject themselves to their preferred avenue for resolving disputes or vindicating rights.

5.3.14 In addition, the regulatory framework that the Public Protector considers in order to determine whether or not a complaint about improper conduct against an organ of state is substantiated, is not confined to the Constitution, and in this case section 23 of the Constitution. In a matter such as the one at hand the Public Protector considers a whole spectrum of applicable law including the provisions of LRA, legislation, judicial precedent (judicial decisions and arbitration awards), collective agreements, common law; and custom and legal writings amongst other norms and standards for proper and fair conduct in state affairs.

5.3.15 The courts[11] have held that a court or tribunal should not easily divest itself of jurisdiction "*as courts do not act on abstract ideas of justice and equity but must act on principle*". The rationale for applying this principle with even more vigour in

[11] Williamson v Schoon 1997 (3) SA 1053.

respect of the jurisdiction of the Public Protector lies in the fact that the criteria envisaged in section 182 of the Constitution, in terms of which the Public Protector has to investigate and evaluate and conduct in state affairs, transcend the notion of lawfulness beyond sole compliance with legal provisions and include considerations of general normative concepts and principles such as equity, good administration and proper conduct (acting fairly and proportionately).

5.3.16 In terms of the Constitution the Public Protector is mandated to oversee and investigate improper conduct or conduct resulting in any impropriety or prejudice. In terms of the Public Protector Act and other legislation the mandate of the Public Protector also expands into areas in state affairs where the improper and prejudicial conduct manifests itself in the form of, but not limited to, maladministration, undue delay, abuse of power, dishonesty and unfair, capricious, discourteous conduct. In the absence of legal definitions the Public Protector has to give content to these concepts by determining norms or standards to serve as requirements of proper and non-prejudicial administration.[12]

5.3.17 This means that every conduct in state affairs can be judged from two different, slightly overlapping and most usually parallel systems; to determine if the organs of state and public institutions in South Africa act in accordance with the law[13] and from the point of view of general standards of good administration. Parties may be able to demonstrate that every applicable rule had indeed been considered but the outcome may still be unfair, which is why it may be necessary to rely on fairness in order to do justice between the parties and to look beyond the letter of the law.

12 As envisaged in Section 182 (1)(a) of the Constitution
13 Sections 7, 33 and 195 of the Constitution

5.3.18 The unique constitutional position of the Public Protector also finds expression in the fact that the complaint-handling process is inquisitorial, by way of investigation, and not by way of adversarial hearings. The difference between the two can be described in the following manner:

a) In an adversarial system, there are commonly two parties who, because they are generally unskilled in presentation of their cases and legal proceedings, are normally represented by lawyers, who would argue issues of law, test the evidence and facts to be resolved, challenge the contentions of the opposing party and protects the interests of his/ her client. The Judge or presiding officer may not "*descend into the arena*" and take too much of an active role in the conduct of the proceedings and into the development of a party's case.

b) In an inquisitorial process followed by the Public Protector, there is no direct confrontation at a hearing between parties and between their lawyers. They provide a level playing field between the individual complainant and organizations complained about. I am not bound to the issues raised for consideration and determination by the parties involved and the objective of an investigation is to seek the truth, knowledge or information concerning the issues and allegations raised in a complaint.

c) This was also emphasised by the Supreme Court of Appeal[14] that the burden of information gathering is placed on the Public Protector rather than the parties – "*he or she is expected not to sit back and wait for proof where there are allegations of malfeasance but is enjoined to actively discover the truth.*" A key feature of the Public Protector system of oversight and accountability

14 *The Public Protector v Mail & Guardian Ltd* (422/10) [2011] ZASCA 108 (1 JUNE 2011).

centers around "*the underlying rationale of the European inquisitorial model, the satisfaction of the public interest in uncovering the truth.*".[15]

Conclusion

5.3.19 The Public Protector has noted and accepted Transnet's submission that the Complainants challenged their dismissals through legal avenues and has no intention of investigating or reviewing the actual decisions and awards of the Courts and the arbitrators in question. However, the findings of the arbitrators or the labour court that the Complainants dismissals were effected in accordance with the law and the requirements of the LRA, would not preclude the Public Protector from determining whether or not the behaviour of Transnet complied with the principles and requirements of proper administration.as evaluated in the issues hereunder

5.4 Regarding whether Transnet sought to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts.

Common cause issues

5.4.1 It is common cause that Messrs Mali and Fredericks as well as Ms Williams were charged with and dismissed for, inter alia, the disclosure of the information in breach of the Transnet Code of Ethics and their contract of employment .

15 *Inquisitorial Processes In Australian Tribunals*, Narelle Bedford, Robin Creyke Published 2006.

5.4.2 It is further common cause that the disclosures related to alleged institutional wrongdoing and financial irregularities by Transnet officials as reported in an article which appeared in the Business Report In November 2009, accusing Transnet of a R5,4 billion cover-up of overspending on its capital expansion programs, particularly at TCP. Emails containing confidential information relating to Transnet were attached to this article.

5.4.3 None of the Complainants accepted any responsibility for the disclosure of the information or any part therein, and they were convicted on circumstantial evidence.

Issues in dispute

5.4.4 It is in dispute that the disciplinary action against the employees suspected of disclosing confidential information amounted to the victimisation of whistle-blowers as their conduct did not fall within the ambit of the protection and remedies provided by the PDA.

5.4.5 Transnet submitted that the action against the complainants involved was justified because the disclosures fell outside the scope of the PDA and duties of the employees towards the employer outweighed the reporting wrongdoing or harm in the media to the public interest.

5.4.6 Transnet stated that the suspected breaches of Transnet policy and in particular, the source of the leaks of confidential company information had been investigated by Transnet Internal Audit ('TIA"). In doing so, TIA interviewed Mr. Dave Bush and Mr Mali, both TCP employees. Mr Bush indicated that he had forwarded the email in question to Mr Mali and that he had replied with the words "pardon me from shooting from the hip". The email containing these words was the version

found in an internet dossier linked to the Business Report article. As part of TIA's investigations, they imaged Mr Mali's computer. Only he and M. Bush had the version of the particular string of emails that found its way into the media.

5.4.7 The string of emails in question bore a date of printing which was recorded on the emails as 16 September 2009. Emails printed on TCP printers record the date of printing at the bottom of the printed page. TEA obtained a copy of Mr Mali's printer records which indicated that he had printed emails on 16 September 2009. Mr Bush's printer record showed that no emails were printed by Mr Bush on 16 September 2009.

5.4.8 According to Transnet Mr Mali refused to undertake a polygraph test.

5.4.9 Transnet further reiterated that at no stage during the internal disciplinary hearing or the TBC arbitration did Ms Williams or her legal representatives admit to and plead that her disclosure of the said confidential information amounted to a protected disclosure within the meaning of the PDA. On the contrary, Transnet stated that Ms. Williams had at all material times denied making any such disclosure. It was accordingly Transnet's considered view that Ms. Williams' conduct does not fail within the ambit of the PDA as alleged.

5.4.10 Following his dismissal and unsuccessful arbitration, Mr Fredericks decided to write a letter to the New Transnet GCE, Mr. Brian Molefe on 31 August 2011 because it was unclear why no action was taken against the people involved, including Mr Frederick's own manager who was responsible for oversight as Head of the Department involved.

5.4.11 Mr Fredericks had on occasion alleged that Transnet acted inconsistently in re-employing other managers but not him. He based this claim on the Labour

Relations Act which requires employees who have been dismissed for the same or similar reasons to be treated consistently.

5.4.12 Mr Fredericks had also previously referred to the alleged reinstatement of four General Managers at TFR. Transnet however noted that these General Managers were not subjected to any disciplinary action or dismissed, neither were they reinstated at TFR. They had resigned. There is no prohibition in any Transnet policy in relation to their eligibility for re- employment.

5.4.13 Transnet noted further that it is accordingly abundantly apparent that Mr Fredericks' dismissal was for gross misconduct which attracted the sanction of dismissal. Mr Fredericks' allegations of improper conduct by Transnet are dishonest and, once again, Transnet noted, an indication of his lack of credibility. Transnet accordingly denied that it had victimised or treated Mr Fredericks unfairly in any way, more specifically that he was dismissed for making an alleged protected disclosure.

Application of the relevant law

5.4.14 Whistle blowing is described as "*the disclosure by current or former members of an organisation of immoral, illegitimate or illegal practices under the control of the employers, to organisations or persons that might be able to effect action*".[16] It has also been defined as the disclosure by an employee of "*confidential information relating to some danger, fraud or other illegal or unethical conduct*

16 *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007, Johnson, R.A. 2003. *Whistleblowing: when it works and why.* London: Lynne Rienner Publishers. Miceli, M.P., Van Scotter, J.R., Near, J.P. and Rehg, M.T. 2001. *Individual differences and whistle-blowing.* Academy of Management Proceedings, 1:1-6.

connected with the workplace, be that of the employer or of his fellow employees".[17]

5.4.15 But does it does not mean that all internal or external reporting of organisational wrongdoing is regarded as whistleblowing as a distinction is made between authorised and unauthorised disclosures. Authorised disclosure relates to the reporting of sensitive or confidential information about organisational wrongdoing through prescribed channels by a person(s) whose job description or level of seniority in the organisation is sufficient to make the disclosure.[18] In other words, persons whose jobs or duties include the detection and reporting of wrongdoing in the organisation, including auditors, forensic investigators and managers.

5.4.16 Unauthorised disclosure is therefore essentially the reporting of sensitive or confidential information in the "wrong way"", ie, through the wrong channels. This could include persons not considered sufficiently senior in the organisation, to make the disclosure or where such reporting does not specifically fall within his/ her job description. [19] It could also include disclosure of sensitive or confidential information by persons authorised to report on wrongdoing, but outside the normal line of communication and reporting, i.e. over someone's head or to external third parties.

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17 Louw, M. 2002. *Ethics in the workplace: Moving to higher ground.* In Verwey, S. and Du Plooy-Cilliers, F. Strategic organizational communication: Paradigms and paradoxes. Sandown: Heinemann Publishers

18 Adapted from Uys, T. and Senekal, A. 2005. *Morality of principle versus morality of loyalty: The case of whistleblowing.* Paper read at the fifth annual conference of Ben- Africa, Botswana, 30 August – 01 September 2005.

19 *Whistle blowing and whistle blower protection in the South African Public Sector* by Natasja Holtzhausen, Doctoral thesis, UNISA, June 2007 , Uys, T. and Senekal, A. 2005. Morality of principle versus morality of loyalty: The case of whistleblowing. Paper read at the fifth annual conference of Ben- Africa, Botswana, 30 August – 01 September 2005.

5.4.17 Whistleblowing, in essence, refers to the situation where an unauthorised disclosure is or should be transformed into an authorised disclosure of wrongdoing following certain prescribed processes and procedures in order to prompt action to address organisational wrongdoing and to protect the whistle-blower from harmful action for reporting wrongdoing in a controversial or unauthorised manner.

5.4.18 In South Africa the Protected Disclosures Act (no 26 of 2000) (PDA) makes provision for procedures in terms of which employees in both the public and private sector who disclose information of unlawful or corrupt conduct by their employers or fellow employees, are protected from occupational detriment.

5.4.19 The PDA defines a "disclosure" as reporting related to past, present or future:

a) *Criminal offence*
b) *Failure to comply with a legal obligation*
c) *Miscarriage of justice*
d) *Endangering health or safety*
e) *Damage to the environment*
f) *Unfair discrimination*
g) *And the deliberate cover up of any of these.*

5.4.20 A disclosure as defined above will only be protected if it follows the proper procedure. In other words it is made to one of the following agencies or entities:

a) *legal adviser (section 5);*
b) *the employer (section 6);*
c) *a member of the Cabinet or Executive Council (section 7);*

*d) the **Public Protector** or Auditor-General (section 8); or*

e) general protected disclosure (section 9)

5.4.21 In the case of *Radebe and another v Mashoff Premier of the Free State Province and Others*[20] the Labour Court, indicated that a disclosure had to be in the form of facts and that speculation, opinions and questioning the decisions and processes of the employer do not amount to facts for that purpose. The Court held that for a disclosure to be protected by the PDA, the employee/applicant must show that the disclosure exhibits all of the following elements. If one is absent, it is not a protected disclosure in terms of the PDA:

a) There must be a disclosure of information.
b) It must be information regarding any conduct of an employer or an employee of the employer.
c) It must be made by an employee (or shop steward).
d) The employee must have reason to believe that the information concerned shows, or tends to show one or more of the improprieties listed under the definition for 'disclosure' (a-g) above.

5.4.22 In a number of recent matters the Courts have emphasised that while the PDA seeks to encourage a culture of whistle-blowing, such protection is not unconditional and –

a) applies to **bona fide and reasonable** disclosures about irregularities at the workplace; [21]

20 2528/2006) [2006] ZALC, paras 53 and 60 (Saflii).
21 *Grieve v Denel (Pty) Ltd 2003 (24) ILJ 551 (LC).*

b) disclosures based on rumour or conjecture, set out deliberately to embarrass or harass the employer will not meet the requirement of good faith; [22]

c) the employer's interest in protecting its reputation must be balanced against the public interest in disclosure of irregularities [23]; and

d) disclosures must be made substantially in accordance with the necessary legislative precepts and the procedures provided by the employer as prescribed or authorised.[24]

5.4.23 At the same time, however, the Labour Appeal Court[25] emphasised that a narrow approach would "*seriously gut the PDA of its essence and purpose*". The Court reiterated that the "*PDA seeks to address important constitutional injunctions regarding clean government and effective public service delivery.*" The Court referred to the statement by the Supreme Court of Appeal in *City of Tshwane Metropolitan Municipality v Engineering Council of SA and Another*, where it was held that a narrow definition of the term "information" under the PDA is inconsistent with the broad purposes of the PDA, namely the encouragement of whistle-blowers in the interests of accountable and transparent governance.

5.4.24 From responses received by the South African Law Reform Commission to Issue Paper 20 of 2002 on Protected Disclosures (whistle-blowers), most of the respondents agreed that the protection and remedies provided by the PDA are not strong enough to engender confidence in the ability of the law to protect whistle-blowers. There is for instance, no express obligation in terms of the PDA on organisations, both public and private, to take proactive steps to encourage

22 *Communication Workers Union v Mobile Telephone Networks (Pty) Ltd 2003 (24) ILJ 1670 (LC)*

23 *Beaurain v Martin N.O. and Others* (C16/2012) [2014] ZALCCT 16; (2014) 35 ILJ 2443 (LC) (16 April 2014)

24 *Magagane v MTN SA (Pty) Ltd and another (JS834/11) [2013] ZALCJHB 77 (17 May 2013).*

25 Radebe and Another v Premier, Free State and Others (JA 61/09) [2012] ZALAC 15; 2012 (5) SA 100 (LAC) (1 June 2012)

and facilitate whistleblowing in the organisation, or to investigate claims that are made by whistle-blowers.[26]

5.4.25 There is general consensus that disclosure of suspected corruption or other malpractice protects the interests of society by helping to ensure that the information gets to the right people at the right time, and where possible, early enough for something to be done before damage occurs. This is a general principle that is also underlined in article 13(1)(b) and (d) of the United Nations Convention Against Corruption (UNCAC) and which requires States parties to take appropriate measures to promote the active participation of society in anti-corruption efforts, to protect freedom of expression, and under, to respect, promote and protect the freedom to seek, receive, publish and disseminate information concerning corruption. In certain jurisdictions articles 13(1)(b) and (d) of UNCAC are interpreted to mean that a public sector employer is, subject to certain limited exceptions (e.g. related to aspects of national security), prohibited from disciplining an employee for providing information to the media and has no right to inquire whether someone has been in touch with the media.

5.4.26 While such measures are not (yet) built into our domestic law, including the PDA, Government's vision in the fight against corruption, as envisaged in, inter alia, the NDP means that the employers 'obligation to handle whistle-blower reports professionally, assess the information on its merits and take the appropriate action to address any wrongdoing is fundamental to building trust and confidence. States, competent authorities and employers have a duty of care to those who engage with them to tackle corruption and other wrongdoing, to take proactive steps to encourage and facilitate whistleblowing in the organisation, or to investigate claims that are made by whistle-blowers.[27]

[26] *Empowering our Whistleblowers* Commissioned by the Right2Know Campaign, in 2013
[27] *Empowering our Whistleblowers* Commissioned by the Right2Know Campaign, in 2013

Conclusion

5.4.27 The criteria for determining whether conduct or actions are proper or not, rest basically on the notion of the rule of law or the requirement that government should act in accordance with both written statutes and with unwritten legal principles and general principles of good governance. If the government action conflicts with these statutes and principles, and does not appear to be justified on other grounds, it cannot in principle be regarded as proper conduct.

5.4.28 In this context, the Public Protector uses his/ her own interpretation of norms and standards that can be seen as authoritative guidelines for good governance, which have in general a promoting effect on the propriety of the way the administrative authorities act.

5.4.29 This means that every conduct in state affairs can be judged from two different, slightly overlapping and most usually parallel systems; to determine if the organs of state and public institutions in South Africa act in accordance with the law[28] and from the point of view of general standards of good administration. Parties may be able to demonstrate that the applicable rules had indeed been considered but the outcome may still be unfair, which is why it may be necessary to rely on fairness in order to do justice between the parties and to look beyond the letter of the law.

[28] Sections 7, 33 and 195 of the Constitution

5.4.30 The Public Protector accepts that business reputation is highly valued and thus workers are subject to strong contractual obligations in this regard. While it is accepted that provisions of the PDA were not invoked to protect the employees suspected of having made the disclosures, against disciplinary action, the Public Protector is of the view that Transnet's approach to the entire incident and the lengths to which it went to take action against all suspected of being involved, demonstrated a certain level of vindictiveness against whistle-blowers which is in view of the Public Protector not reconcilable with key principles underpinning good corporate governance as discussed above.

5.5 Whether or not Transnet improperly failed to reinstate the Complainant, Mr Mali in compliance with an arbitration award in favour of the Complainant.

Common cause issues

5.5.1 It is common cause that Mr Mali obtained an arbitration award in his favour subsequent to his dismissal, and prior to the review proceedings in the Labour Court.

5.5.1.1 At the time the arbitrator found that the dismissal was substantively unfair. He ordered re-instatement with retrospective effect to the date of dismissal, on terms and conditions no less favourable than those applicable at the time of his dismissal and without forfeiture of any benefits which would have accrued to Mr Mali but for the unfair dismissal. He also ordered that Mr Mali be back-paid a sum of R250 000-00 by no later than 30 September 2010.

5.5.2 Transnet obtained an urgent interdict against this action in the Labour Court on 22 October 2010 – including an order to stay the enforcement of the arbitration

award pending an application for review of the arbitration award in the Labour Court.

5.5.3 Transnet subsequently did not implement the arbitration award as it had resolved to take the matter on review to the Labour Court.

Application of the relevant Law

5.5.4 The legal position at the time was encapsulated as follows in ***Professional Security Enforcement v Namusi [1999] 6 BLLR 610 (LC)*** *at paragraph 10:*

'Neither the Act not the common law lays down a hard-and-fast rule that an application to have an award (or any judicial order) made an order of court must be dismissed or conditionally postponed if the person against whom it is to be made has applied for its rescission or review... "there is no legal provision that provides for the automatic suspension of the enforceability of an arbitration award by an application for review. Both section 145 (3) of the Act and section 33 (3) of the Arbitration Act 42 of 1965 provides that a court may, if it considers that the circumstances so require, stay the enforcement of the award pending its decision on the review of an award. The mere fact that a review application is pending is not a bar to making an award an order of Court.[29]

Conclusion

5.5.5 Mr Mali took action during the course of the Public Protector's investigation to make the award an order of court and to execute it against Transnet, in response to which Transnet obtained an urgent interdict against this action in the Labour

29 *The Court referred to National Education Health & Allied Workers Union on behalf of Vermeulen v Director General: Department of Labour (2005) 26 IU 911 (LC) at paragraph [23]; Ntshangase v Speciality - Metals CC (1998) 19 IU 554 (LC)*

Court on 22 October 2010 – including an order to stay the enforcement of the arbitration award.

5.5.6 Subsequent to the issuing of the interdict Transnet was therefore within its rights not to implement the arbitration award pending the finalisation of the review proceedings in the Labour Court – where the award was set aside.

5.6 Whether or not Transnet treated the Complainant and other employees who complained to the Public Protector, unfairly based on the inconsistent application of discipline by failing to act against other employees in similar instances of the same acts of alleged financial misconduct

Common cause issues

5.6.1 It is common cause that during 2011 the Transnet Board commanded a forensic investigation into, *inter alia* alleged inconsistencies in the practices pertaining to the identification, administration and management of disciplinary processes relating to non-compliance with procurement procedures in certain circumstances, which were linked to the matter of Mr S Gama.

5.6.2 On the issue of consistency, the Forensic Investigation focussed on "*similar fact matters*" of alleged procurement irregularities dealt with through Transnet's disciplinary process, as well as other matters. The period covered by the Forensic Investigation largely overlapped with the period in which action was taken against the Complainants concerned.

5.6.3 The Forensic Investigation included a tender process audit (internal audit) in terms of the 2008/9 Audit Plan as approved by the Transnet Audit Committee. According to the Forensic Investigation Report this audit revealed a significant number of failures to follow due process as prescribed by the DPP. Significant control failures were identified creating both a business and legislative risk for Transnet. The following root causes were identified as reasons for non-compliance:

a) Governance: Requirements for approval before tender process is initiated, the establishment of evaluation committees, record keeping and declaration of interest are not clearly stated in the Detailed Procurement Procedures (DPP)

b) People: Responsible persons do not, at all times, adhere to the specific requirements of the DPP due to lack of accountability; Senior Management do not consider and adhere to the DPP in all decisions; General lack of knowledge regarding the requirements of the DPP; and

c) Methods and Practices: Documentation does not provide evidence of compliance to the DPP; a standard process or central repository for management of contracts does not exist.

5.6.4 Specific findings highlighted by the internal audit report include:

a) No approval for confinement;
b) Tenders not approved by the Acquisition Council (AC);
c) Contracts amended without AC approval;

d) Delays in finalising contracts; and

e) Payments without formal agreement.

5.6.5 It was further noted in the Forensic Investigation that no disciplinary action was implemented against those responsible for the non-compliance as set out in the internal audit report.

5.6.6 Based on the consultations held and the review of the documents regarding condonation it appears that "transgressing persons" were able to apply for condonation to their line manager who would in turn approve the condonation or submit the submission to the relevant authority, for example, the Divisional Acquisition Council (DAC), for approval as appropriate. Non-compliance with material aspects of Transnet's policies and procedures would usually not be condoned as such lapses have PFMA implications, which could result in civil, criminal or disciplinary steps being taken. Transgressions having PFMA implications relate to instances where the company incurs irregular expenditure or excessive expenditure.

5.6.7 The sample of condonations considered during the course of the Forensic Investigation related to procurement irregularities including contracts not extended correctly, contracts amended without the appropriate authorisation, issuing of tenders for a five year contract contrary to the limited two year period per the Transnet Procurement Procedures Manual (PPM), condonations to pay for the security services rendered without contracts in place and condonations for the confining and award of business.

5.6.8 The Forensic Investigation found that from the sample of the condonations selected it was evident that there was lack of consistency in terms of the submissions made for condonations. The sample of items selected revealed that

there was no indication as to when the business became aware of the non-compliance. It was further found that there was not any consistent time as to when the condonations were prepared vis-à-vis for example the contract expiry date of contracts vis-à-vis the date condonations were approved by DAC.

5.6.9 The Forensic Investigation further found that –

a) There was no prescribed period within which to apply for condonations as the concept of "reasonable time" in terms of becoming aware of the potential irregularity, the submission of the condonation and the approval of the submission was not consistently applied.

b) No specific time frame was applied in the application for and granting of condonation;

c) No disciplinary action was taken against any of the staff members for the condoned procurement irregularities and management responses under the management comment section of the report did not indicate any intention to investigate the matters and take the necessary disciplinary steps.

d) The disciplinary process was therefore not consistently applied to all transgressions but rather that a process of condonation was consistently applied with no disciplinary action being taken against offenders.

Issues in dispute

5.6.10 It is in dispute hat Transnet instituted disciplinary action against the Complainants in a selective or inconsistent manner by failing to act against other employees in similar instances of the same acts of alleged financial misconduct.

5.6.11 Evidence of Mr J Blose

5.6.11.1 Mr Blose is the former Security Manager at the Port of Durban. He stated that he was treated unfairly by Transnet in the institution of disciplinary charges against him in a matter where he was not involved and where his manager had acted with the full knowledge and approval of the Chief Executive of TFR and the advice of their Legal Advisor.

5.6.11.2 With regards to the second charge, his undisputed version was that it was not his responsibility to make submissions to the NPA Tender Board as it was a function of procurement department. Therefore he could not be held accountable for failure to ensure that a proper submission was timeously made. This version too was allegedly not disputed by the Transnet's witnesses.

5.6.11.3 With regards to the third charge his undisputed version was that he was not aware that the NPA Tender Board had rejected the submission from the Local Tender Committee where the latter had sought the condonation of non-compliance with procurement procedures when Unkonka was engaged. He stated that he was never a member of the Local Tender Committee and was not privy to the deliberations of that committee.

5.6.11.4 The chairperson of the disciplinary enquiry found him guilty and imposed a sanction of dismissal.

5.6.11.5 Mr Blose reiterated that he was never interviewed by anybody when the matter regarding the engagement of Unkonka Security Services was investigated, including E & Y. In August 2006 he received a call from the investigator from E & Y, who wanted to persuade him to write a statement indicating that all he did regarding Unkonka engagement was to follow Mr Ndlovu's instructions. He refused and provided the investigator with his understanding of the events.

5.6.11.6 Mr Blose stated that during the proceedings Transnet never tabled any evidence of wrongdoing on his part and that he refused to take a stand since there was nothing to dispute, as the company never tabled any witness or piece of paper to prove any wrongdoing on his part.

5.6.11.7 Mr Blose is convinced that he was charged because he was perceived to be loyal to Mr Gama. During this process speculations were making rounds in terms of who would replace then CEO Ms Ramos and it happened that "*Mr Gama's name was on everybody's lips.*"

5.6.12 Evidence of Mr B Ndlovu

5.6.12.1 Mr B Ndlovu is the former Port Manager for the Durban Port. When he was appointed as the Port Manager, Mr Blose was the Security Manager at the Port of Durban. Mr Ndlovu approached the Public Protector with a complaint that he was unfairly treated by Transnet when charges of misconduct were brought against him for extending a contract of a service provider for security services.

5.6.12.2 Mr Ndlovu emphasised that after deliberations between the Tender Boardemployees it was agreed to allow Unkonka to stay in on a month to month basis whilst the matter was forwarded to both local and Transnet Tender boards. Before making the offer Mr Ndlovu stated that he made a call to Mr Gama to inform him of their decision, which he supported. Thestatus-quo to remain until all internal procurement procedures had been finalized. Unkonka was to remain with a small section of the NPA area to guard, in this manner the other three security service providers were not prejudiced and thereby not causing any undue fruitful and wasteful expenditure.

5.6.12.3 Mr Ndlovu was later instructed by Ms Sithole to terminate the contract with Unkonka. A letter of termination of services was sent to Unkonka effective 17 January 2006. Unkonka went to court and obtained an interdict in its favour. Unkonka therefore had to be treated the same as the other three contractors.

5.6.12.4 Transnet commissioned an investigation by E & Y into these matters. On 07 December 2006 Mr Ndlovu was summoned to a meeting by his General Manager, Ms Nozipho Sithole where he was informed *inter alia* that as a result of certain forensic investigations by Transnet, he was to be suspended with immediate effect. He stated that was not given a written notification for the suspension nor was he appraised of the full details of the suspension.

5.6.12.5 Mr Ndlovu was charged with misconduct relating to the appointment of Unkonka without proper authority and without following proper procurement procedures. He was also charged with failure to comply with the instruction of Ms Sithole to terminate the services of Unkonka.

5.6.12.6 Mr Ndlovu alleged that there were some deficiencies in the procurement process that wrongly excluded the service provider and he acted on the instructions of the Port legal Advisor as well as the full knowledge and approval of the Chief Executive Officer of the National Ports Authority (NPA.)

5.6.12.7 Mr Ndlovu was found guilty and the Chairperson of the Disciplinary Committee imposed a sanction of dismissal on 16 October 2007.

5.6.12.8 Mr Ndlovu referred the matter to the TBC on 5 November 2007. However the TBC never arbitrated his dispute as it allegedly refused to set the matter down for arbitration. Mr Ndlovu could not proceed as, at that time he had been unemployed for three years and could not afford to pay the lawyers anymore. His assets were attached as he could no longer service his obligations to his creditors.

5.6.12.9 In addition, Transnet allegedly refused to pay his bonus for 2007 as well as a salary increase for 2007. The stance adopted by Transnet reportedly caused Mr Ndlovu irreparable harm. He stated that he suffered serious emotional stress and injury to his dignity.

5.6.13 Evidence of Mr B M Ngwenya

5.6.13.1 Mr Ngwenya informed the Public Protector that he was employed by the NPA, a Transnet subsidiary division, based in Richards Bay Port as a Security Manager.

5.6.13.2 During 2006 he was suspended and charged with financial misconduct.

5.6.13.3 "*1.* According to Mr Ngwenya the Port Manager was expected to initiate an investigation against him if there was any wrongdoing or any disregard to the procedures, but the investigation was initiated from Transnet Head Office in Johannesburg, using a company of lawyers from Sonnenberg and Nathan which he alleged enjoyed a close relationship with Mr Vuyo Kgatla who was allegedly the driving force behind this matter. He was of the view that if there was any wrongdoing on his part, he should have been charged together with the Port Manager, the Procurement Manager and the Finance Manager.

5.6.13.4 The eventual outcome of the disciplinary hearing was that of dismissal. Mr Ngwenya challenged his dismissal in the Commission for Conciliation, Mediation and Arbitration (CCMA). During the course of the hearing, the matter reached a stage where a settlement was to be made between Mr Malan (Transnet Lawyer) and Mr Ngwenya's lawyer Mr Shangase, where he was given an option to take an amount of money and leave the company. He refused the offer.

5.6.13.5 On the set date around 2007 the matter was hindered by an argument that ensued between the legal representative of Transnet and his lawyer. The issue was based on a certain questionnaire which his lawyer was expected to complete with him in order to speed up the process of the hearing.

5.6.13.6 At the time Mr Ngwenya's lawyer required payment of an amount of R12 000, 00 as legal fees to enable the matter to continue at the CCMA. Mr Ngwenya was unable to raise the money since he was unemployed and did not have any other source of income.

5.6.13.7 Mr Ngwenya informed that Public Protector that he was employed by the NPA, Transnet subsidiary division, based in Richards Bay Port as a Security Manager. He approached the Public Protector with a complaint that he was unfairly treated by Transnet trough the institution of disciplinary action him and his subsequent dismissal. He stated that the disciplinary action was not instigated by his own managers but was "instigated" at the Transnet Head Office in Johannesburg, Mr Vuyo Kgatla, who was allegedly the driving force behind this matter. Mr Kgatla reportedly used a company of lawyers with which he had a close relationship.

5.6.13.8 Mr Ngwenya also alleged that if there was any wrongdoing on his part, he should have been charged together with the Port Manager, the Procurement Manager and the Finance Manager.

Application of the relevant law

5.6.14 Section 9 of the Constitution of the Republic of South Africa (the Constitution) states that:

"(1) Everyone is equal before the law and has the right to equal protection and benefits of the law

(2) Equality includes the full and equal enjoyment of all rights and freedom. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, is advantaged by unfair discrimination may taken"

5.6.15 Section 10 of the Constitution provides for the dignity of every person to be respected and protected. Section 23 of the Constitution affords fair labour

practices to everyone and section 33 of the Constitution provides for administrative action to be lawful, reasonable and procedurally fair.

5.6.16 Schedule 8 of the LRA contains the Code of Good Practice which inculcates a system of fairness for both substantive and procedural elements of discipline. In essence, the Code of Good Practice sets out the minimum criteria for employers to meet in establishing fairness in disciplinary procedures. In addition to procedural fairness, employers must also apply substantive fairness by ensuring that there is consistency in determining the appropriate sanction where a rule is breached. The issue of consistency has been considered by our courts and the principles mentioned hereunder applied by the courts must be taken into consideration by Transnet when taking disciplinary action against acts of misconduct.

5.6.17 From a labour perspective, the principles of fairness and equity or equality imply that all employees who have committed misconduct must be treated similarly unless there is some justification to treat them differently [30] The Courts emphasised that as far as differentiation or selective discipline is concerned, "*some inconstancy is the price to be paid for flexibility which requires the exercise of discretion in each individual case*"[31] but it would be unfair if it is a result of some discriminatory management practice or policy.

5.6.18 The Courts have that reasonable consistency of punishment was an indispensable element of disciplinary fairness. [32] A disciplinary action which is not in line with a series of uniform disciplinary processes and sanctions, previously meted out in identical offensive situations of misconduct, inevitably

30 See Mabinana and others v Baldwins Steel (1999)5 BLLR 453 LAC.

31 Greater Letaba Local Municipality v Mankgabe NO & others [2008] 3 BLLR 229 (LC)

32 *SA Commercial Catering and Allied Workers Union and others v Irvin & Johnson* (1999)20 ILJ 2302 (LAC) *SACCAWU & others v Irvin & Johnson Ltd* (1999) 20 ILJ 2302 (LAC))

opens up an abusive avenue for selective discipline. The Courts reiterated that unless-

"... *an employer is seen to be manifestly consistent in punishing the offending employees even-handedly, there is the danger that the offender's fellow employees will inevitably and justifiably so consider themselves to be hard done by and aggrieved by the employer's selective discipline.*"

And

"The underlying rationale of the principle of consistency lies in the fact that it extenuates the perception of bias which is inherent in the labour practice of selective discipline. Unlike selective discipline, consistent discipline creates certainty and enhances the faith of the workforce in the unbiasness of the employer's disciplinary system as a fair, just and equitable system. It promotes respect and obedience for the rules which are seen to be impartially enforced"[33]

Conclusion

5.6.19 It was contended that Transnet was unfair and inconstant in handling issues of misconduct against some of the Complainants, including in respect of alleged procurement irregularities in respect of Mr Blose, Mr Ngwenya and Mr Ndlovu while other people who were involved and who might have been co-perpetrators, were never charged. It was submitted that Transnet chose to discipline certain employees while turning a blind eye to others in order to serve certain agendas within Transnet associated with a perceived power struggle for the position of successor to Ms M Ramos as Chief Executive Officer.

5.6.20 Similarly, the complaints of Mr Fredericks, Ms Williams and Mr Xaba also hinge on issues of selective accountability where the manner in which decisions were

33 Ibid

taken on organisational level to investigate and institute disciplinary charges, appear to be arbitrary and inconsistent. The decision for instance, to take disciplinary action against people suspected of being involved in the disclosure of confidential information relating to serious allegations of irregularities, without any action being taken against the officials implicated in the irregularities, is a point in case.

5.6.21 The evidence contained in the Forensic Investigation Report discussed earlier in the report confirms that during 2007 to 2010 there were a number of projects where non-compliance with Transnet procurement procedures were condoned and persons responsible for non-compliance were not subjected to the disciplinary process. In the Forensic Investigation Report it was concluded that its observations were in line with concerns raised with the Board that not all employees who had acted in a similar way, "*had been charged for tender irregularities and therefore that* ***there was selective bringing of charges***".

5.6.22 This leads the Public Protector to conclude that the Complainants are justifiably aggrieved by the fact that Transnet selectively pursued disciplinary action against some employees suspected of procurement irregularities while others who were necessarily implicated by virtue of their positions and responsibilities escaped scot-free. Accordingly, Transnet's conduct in this regard falls foul of the standards of fairness, consistency and equal prot4ction of the law as envisaged in, inter alia, section 9(1) of the Constitution and Item 3 of Schedule 8 of the Labour Relations Act, Code of Good Practice.

5.7 Regarding whether or not Transnet improperly victimised the Complainants because of their perceived loyalty to or support of a Member of the Executive Management of Transnet who was at the time listed as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet

Common cause issues

5.7.1 It is common cause that in late 2009 Cabinet was about to consider appointing the new GCE for Transnet following the departure of Ms Maria Ramos. In the last quarter of 2008, after Ms Ramos' intended resignation became known, the Corporate Governance and Nominations Committee (GCM Committee) of the Transnet Board had decided on a short-list of five candidates, which included Mr S Gama.[34]

5.7.2 Amidst media reports of a succession battle between some of the candidates, Mr Gama approached the Courts with regard to disciplinary action taken against him. Evidence submitted during the proceedings contended that Mr Gama was the subject of a conspiracy within Transnet and that certain action and decisions were taken and timed with a view to prejudice his prospects of filling the vacancy for the Group CEO position of Transnet.[35]

5.7.3 For the purposes of this report and in the context of this investigation it is not necessary to deal with the saga around the dismissal and reinstatement of Mr Gama and the internal review process conducted by the Board of Directors, save for the fact that the Complainants in this matter are of the view that their perceived relationship or association with Mr Gama, was a major contributing factor to the actions against them. Since the actual reasons for the actions against them would not reflect their suspicions as a management practice or policy, the assessment of their claims would largely have to rely on the objective verification of some perception of organisational bias towards groups of employees associated with the potential candidates to succeed Ms Ramos.

34 Gama v Transnet Limited and Others (09/38956) [2009] ZAGPJHC 75 (7 October 2009)
35 Gama v Transnet Limited and Others (09/38956) [2009] ZAGPJHC 75 (7 October 2009

Issues in dispute

5.7.4 It is dispute that the disciplinary action against the Complainants was motivated by ulterior motives linked to the succession struggle within Transnet after the resignation of Ms Maria Ramos as Group CE.

5.7.5 All the Complainants submitted that the disciplinary action taken against him because he was perceived to be a supporter of Mr S Gama, the Chief Executive Officer Transnet Freight Rail, as a candidate to take over from Ms Ramos as GCE of Transnet.

5.7.6 Mr Xaba alleged that the charges against him were preceded by an incident on 26 May 2008 where he wrote to his Manager about a confrontation between them that occurred on 29 February 2008 in his office at Elandsfontein.

5.7.7 The discussion related to a meeting that was alleged to have taken place between Mr Xaba and Mr Siyabonga Gama, regarding an alleged strategy or plan in terms of which Mr Gama would have taken over from Ms Ramos, and in turn appoint Mr Xaba to take over from Ms Moira Moses as Group Executive Transnet Capital Projects. Since that confrontation the relationship between Ms Moses and Mr Xaba allegedly "took a nose dive."

5.7.8 The Manager reportedly responded on 29 May 2008 as follows:

"Regarding the issue I raised with you regarding succession of Maria and myself, this matter had been raised with me by two senior managers within Transnet Capital Projects. I viewed it in an extremely serious light as it involved one of my

fellow Executives as well. As this was a highly sensitive issue, I discussed it with the Group Chief Executive and the Chief Operation Officer and then met with you to inform you of the issue and to understand whether you had any knowledge of the issue. I believe that we had an open and frank discussion and dealt with the matter."

5.7.9 Mr Xaba was of the view that he was "a marked man" as he was perceived to be a threat to his manager. The charges against him were intended to formalise his exit from the organisation "*so as to mitigate the perceived threat.*

5.7.10 According to Mr Xaba both the Chairman of the disciplinary hearing and the arbitrator refused to consider his submissions with proof of correspondence that the decision to get rid of him had been taken much earlier before he was charged. He presented correspondence between his Manager, Ms Moses, and him which were proof that she was no longer comfortable with him as he was perceived to be a supporter of Mr Gama.

5.7.11 Mr Blose is also convinced that he was charged because he was perceived to be loyal to Mr Gama. During this process speculations were making rounds in terms of who would replace then CEO Ms Ramos and it happened that "Mr Gama's name was on everybody's lips."

Application of the relevant Law

5.7.12 The Complainants are in essence contending that the process followed in bringing disciplinary proceedings against them was not fair in that actions were deliberate, devoid of good faith and motivated by an ulterior purpose. The constitutional challenge of decisions tainted by a perception of bias is also based on an interpretation of the constitutional principles governing public administration set out in sections 195(1) and (2)(b) of the Constitution.

5.7.13 The fundamental principles of administrative law are entrenched in Chapter 2 of the Constitution which guarantees the right to administrative action that is lawful, reasonable and procedurally fair[36]. This is affirmed by Judge Chaskalson in the judgment of the *Pharmaceutical Manufacturers* case[37] that the Constitution is the supreme law in South Africa and the exercise of public power must be in line with the Constitution.

5.7.14 In the *Heyneke* case[38] the Court noted that the common law principle of legality demands that public power be exercised reasonably, in good faith, in the public interest and not be misconstrued. The exercise of public power is legitimate only if it is lawful.[39] The Court held that the rule of law as a founding constitutional value and an element of the principle of legality elevates legality to a constitutional principle –

"As a constitutional principle, legality governs the use of all public power. Legality is not confined to administrative law. Therefore, irrespective of whether an act falls within the ambit of administrative or labour law, the principle of legality applies."

5.7.15 In 2000 the Promotion of the Administrative Justice Act 3 of 2000 (PAJA) (RSA, 2000) was enacted to give effect to section 33 of the Constitution and has "become the legislative foundation" for South African administrative law. Section 6(2)(e)(ii) of PAJA subjects action taken for an ulterior purpose or motive to

36 Section 33 of the Constitution, 1996

37 *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte Application of the President of the RSA 2000 (3) BCLR 241 (CC)*

38 Heyneke v Umhlatuze Municipality (D908/09) [2010] ZALC 57; (2010) 31 ILJ 2608 (LC) (24 March 2010)

39 Cora Hoexter *Administrative Law in South Africa* Juta 2007 117, also see Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC

judicial review. Sections 6(2)(e)(v) and (vi) bring actions taken in bad faith, arbitrarily or capriciously under judicial review.

5.7.16 Under labour law, employment is a contract. Like all contracts it implies a duty of good faith.[40] This common law position is fortified by the constitutional right of "everyone" to fair labour practices guaranteed in section 23 of the Constitution and section 185 of the LRA. Consequently, the duty to exhibit good faith is mutual, weighing as much on employers as it does on employees.[41]

5.7.17 An ulterior purpose exists when power given for one purpose is used for another purpose.[42] The organ must have intended the act and, if it was aware that the purpose was not authorised, it will have acted in bad faith. Bad faith exists if the organ claims to be acting for one purpose but knowingly acts for another private or public interest out of, say, spite or ill will, or to benefit the organ or its relations.[43]

5.7.18 According to *Wiechers*[44], bad faith can be presumed on a balance of probability if the evidence clearly indicates that the organ not only misconceived its powers and misjudged the facts, but should also have realised or did in fact realise that it was performing an invalid act. The organ may rebut this presumption by adducing facts that place it above suspicion. In the *Heyneke* case[45] the Court emphasised that –

40 Martin Brassey Employment and Labour Law Vol 1 C:26

41 Tek Corporation Provident Fund and Others v Lorentz (490/97) [1999] ZASCA 54; [1999] 4 All SA 297 (A) (3 September 1999., In Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597 (ChD) at 606.

42 Cora Hoexter Administrative Law in South Africa Juta 2007 276 fn 314

43 Marinus Wiechers *Adminstrative Law* Butterworths 1985 232-233 , JR de Ville *Judicial Review of Administrative Action in South Africa* Butterworths 2003 175

44 Marinus Wiechers *Adminstrative Law* Butterworths 1985 232-233

45 Heyneke v Umhlatuze Municipality (D908/09) [2010] ZALC 57; (2010) 31 ILJ 2608 (LC) (24 March 2010)

"The basis of the bad faith or motive is irrelevant, its mere existence being sufficient to violate the principle of legality. Even an altruistic motive cannot confer legitimacy on the exercise of public power for an unauthorised purpose."

5.7.19 "*Rationality*", also an independent test for and a principle of legality and the rule of law, an indicator of motive and bad faith[46], is elevated to a statutory ground in Section 6(2)(f)(ii) PAJA, which sets the test out as follows:

"Rationality is connected to-
(aa) the purpose for which it (action) was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator; or
(dd) the reasons given for it by the administrator".

5.7.20 In the case of *SA Chemical Workers Union & others v Afrox Ltd* [47] at para 32 the Court set out an approach in respect of an enquiry relating to the existence of bad faith or an ulterior motive as follows:

"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation ... The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. The next issue is one of legal causation, namely whether such participation or conduct was the "main" or "dominant", or "proximate", or "most likely" cause of the dismissal... the most

46 Heyneke v Umhlatuze Municipality (D908/09) [2010] ZALC 57; (2010) 31 ILJ 2608 (LC) (24 March 2010)
47 SA Chemical Workers Union & others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)

practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal."

5.7.21 In the *SA Chemical Workers Union* case[48] the Court also noted that some guidance as to the nature of the evidence required is to be found in *Maund v Penwith District Council* [1984] ICR 143, where Lord Justice Griffiths of the Court of Appeal held at 149 that:

'[I]t is not for the employee to prove the reason for his dismissal, but merely to produce evidence sufficient to raise the issue or, to put it another way, that ***raises some doubt about the reason for the dismissal****. Once this evidential burden is discharged, the onus remains upon the employer to prove the reason for the dismissal."*(own emphasis)

Conclusion

5.7.22 Collectively in terms of all the issues covered in the investigation, there are in the Public Protector's view a number of factors observed objectively from the evidence at hand, which raises doubt about the real reason for the actions against the Complainants in this matter and support a perception of bias that threatens to taint the entire process:

a) Evidence of a succession struggle within Transnet after the resignation of Ms Maria Ramos as Group CE, involving the candidacy of Mr S Gama;

[48] SA Chemical Workers Union & others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)

b) The protected disclosure of information confirming the unlawful monitoring and interception of Mr Gama's private communications by Transnet;
c) Transnet's apparent desire to control the process of the selection of arbitrators for the resolution of disputes before the TBC;
d) Selected and inconsistent disciplinary practices involving similar transgressions for which some of the Complainant were charged with procurement irregularities; and
e) A certain level of vindictiveness against employees suspected of whistle-blowing which is irreconcilable with key principles underpinning good corporate governance.

6. FINDINGS

After careful examination of the evidence obtained during the investigation, and the regulatory framework setting the standard that should have been upheld by the Department, the Public Protector's findings are as follows:

6.1 Regarding whether Transnet as the employer improperly attempted to influence the outcome of arbitration proceedings in the Transnet Bargaining Council in its favour by endeavouring to control the appointment of arbitrators:

6.1.1 The allegation that Transnet improperly attempted to influence the outcome of arbitration proceedings in the TBC in its favour by endeavouring to control the appointment of arbitrators is substantiated;

6.1.2 Transnet went beyond what could be reasonably regarded as exploring the suitability of arbitrators, in total disregard for the privacy of the parties involved and its legal duty of good faith towards its employees as well as its stated commitment to the TBC dispute resolution processes;

6.1.3 Under the circumstances, Transnet's efforts at the time to ensure that it has the deciding vote or final say in the appointment of arbitrators in the TBC can be construed as attempts to undermine the dispute resolution processes governed by Rule 22 of the TBC Rulesaimed at safeguarding the impartiality of arbitrators and ensuring that both parties enjoy equal protection and benefit of the law. Transnet's conduct fall foul of the spirit of the law as embodied in sections 9(1) and 34 of the Constitution; and

6.1.4 Transnet's actions constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.2 Regarding whether Transnet or employees in its employment improperly engaged in the unlawful monitoring of cellular contacts or communications between an employee or employees and third parties, without the knowledge and consent of the employee(s)

6.2.1 The allegation that Transnet or employees in its employment improperly engaged in the unlawful monitoring of cellular contacts or communications between an

employee or employees and third parties, without the knowledge and consent of the employee(s) is substantiated;

6.2.2 A protected disclosure made to the Public Protector in terms of section 8(1) of the Protected Disclosure Act revealed that there were instances where Transnet intercepted the communications of an employee without the consent of the employee, or obtained information through the unlawful monitoring or surveillance of the employee;

6.2.3 The actions of Transnet and the relevant employees involved in such conduct was in violation of the provisions of Regulation 2 read with Regulation 6 of the Regulation of Interception of Communications and Provision of Communication-Related Information Act No. 70 of 2002, as Transnet was not legitimately pursuing suspicions of misconduct on communication facilities that had been provided by Transnet;

6.2.4 Transnet disregarded the right to privacy of the employee concerned provided for in section 14 of the Constitution, as well as the common law reciprocal duty of good faith between employer and employee; and

6.2.5 Transnet's action constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.3 Whether Transnet improperly failed to follow due process in the disciplinary action and subsequent dismissal of the Complainants:

6.3.1 The allegation that Transnet improperly failed to follow due process in the disciplinary action and subsequent dismissal of the Complainants is not substantiated;

6.3.2 The Complainants challenged the lawfulness of their dismissal in the appropriate forums provided for in the Labour Relations Act where the substantive and procedural fairness of such dismissals were confirmed by an award or order of the Court;

6.3.3 However, the findings of the arbitrators or the labour court do not preclude the Public Protector from determining whether or not the behaviour of Transnet complied with the principles of fairness and requirements of proper administration.

6.3.4 The Public Protector observed that Transnet's conduct violated the principles of fairness and equity envisaged in section 9; 10; 23 and 33 of the Constitution; and

6.3.5 Transnet's action constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.4 Regarding whether Transnet treated the Complainants unfairly by seeking to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts:

6.4.1 The allegation that Transnet treated Complainants unfairly by seeking to victimise employees suspected of external whistleblowing while failing to act on the disclosed information against employees implicated in perceived wrongful acts is substantiated;

6.4.2 Transnet's approach to the incidents and the lengths to which it selectively went to take action against all suspected of being involved, demonstrated a certain level of vindictiveness against whistle-blowers, which cannot be reconciled with the country's national and international commitments to accountable and

transparent governance under, *inter alia*, article 13(1) (b) and (d) of the United Nations Convention Against Corruption (UNCAC) and the National Development Plan, 2030;

6.4.3 Transnet's actions are therefore not consistent with key principles underpinning good corporate governance, governing public administration as set out in sections 195(1) and (2)(b) of the Constitution; and

6.4.4 The Public Protector finds that Transnet's actions in this regard constitutes maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.5 Regarding whether Transnet improperly failed to reinstate the Complainant, Mr Mali, in compliance with an arbitration award in favour of the Complainant:

6.5.1 The allegation that Transnet improperly failed to reinstate the Complainant, Mr Mali, in compliance with an arbitration award in favour of the Complainant is not substantiated;

6.5.2 The arbitration award was issued on 1 September 2010 and Transnet subsequently took the matter on review to the Labour Court;

6.5.3 On 22 October 2010 Transnet obtained an order to stay the enforcement of the arbitration award pending the outcome of the review proceedings. The Labour Court ruled in Transnet's favour on 30 May 2012 that Mr Mali's dismissal was substantively fair; and

6.5.4 The Public Protector could not find any improper conduct, undue delay or maladministration on the part of Transnet in relation to the implementation of the arbitration award in respect of Mr Mali.

6.6 Regarding whether Transnet treated the Complainants unfairly based on the inconsistent application of discipline, by failing to act against other employees in similar instances of the same acts of alleged financial misconduct:

6.6.1 The allegation that disciplinary action was taken selectively against the Complainants while other Transnet employees who were involved and who might have been co-perpetrators, were never charged, is substantiated;

6.6.2 A Transnet Forensic Investigation confirmed that during the period in question, from 2007 to 2011, there were a number of projects where non-compliance with Transnet procurement procedures were condoned and persons responsible for non-compliance were not subjected to the disciplinary processes;

6.6.3 At the same time the Complainants, Messrs Ndlovu, Ngwenya and Blose were charged and dismissed for similar charges without any option for condonation;

6.6.4 Transnet's failure to ensure consistency in respect of the institution and management of disciplinary processes for non-compliance with procurement procedures violated the principles of fairness and equity or equality envisaged in sections 9, 10, 23 and 33 of the Constitution; and

6.6.5 Transnet's actions amount to maladministration as envisaged in section 6(4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.7 Regarding whether Transnet improperly victimised the Complainants because of their perceived loyalty to or support of a Member of the

Executive Management of Transnet who was at the time identified as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet:

6.7.1 The allegation that Transnet improperly victimised Complainants because of their perceived loyalty to a Member of the Executive Management of Transnet who was at the time identified as a potential candidate to succeed Ms M Ramos as Group CEO of Transnet, is substantiated;

6.7.2 A number of factors collectively, in terms of all the issues covered in the Public Protector's investigation, buttressed by an objective assessment of the evidence at hand, raise sufficient doubt about the real motivation behind Transnet's actions against the Complainants;

6.7.3 There is evidence to support a perception of bias that tainted the entire process, and include objective evidence of a succession struggle within Transnet after the resignation of Ms Maria Ramos as Group CEO, Transnet's unlawful monitoring and interception of employees' private communications, selected and inconsistent disciplinary practices and the level of malevolence displayed towards suspected whistle-blowers;

6.7.4 Transnet's behaviour overall is in violation of the values and principles protected by sections 23 and 33 of the Constitution, as well as the prohibition of action taken for an ulterior purpose or motive in terms of section 6(2) (e) (ii) of PAJA and actions taken in bad faith, arbitrarily or capriciously in terms of sections 6(2) (e) (v) and (vi) of PAJA; and

6.7.5 Accordingly Transnet's actions amount to maladministration as envisaged in section 6 (4) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

7. REMEDIAL ACTION

The appropriate remedial action I am taking as contemplated in section 182(1) (c) of the Constitution is the following:

7.1 The Chief executive Officer of Transnet is to:

7.1.1 Ensure that Transnet diligently complies with its obligations in terms of the TBC Constitution and Rules relating to the appointment of arbitrators in the TBC to ensure that the conduct of its employees meets the requirements of good faith and fairness envisaged in section 23 of the Constitution.

7.1.2 Ensure that action is taken including reporting the matter to the South African Police Service, to deal with violations of its Telephone, Email and Electronic Communications Policy and the unlawful interception and monitoring of communications, contemplated by the Regulation of Interception of Communications and Provision of Communication-related Information Act by Transnet officials.

7.1.3 Embark on a process, in consultation with the Complainants through the Office of the Public Protector, to provide the Complainants with a financial remedy not less than an amount equal to the remuneration which may be paid to an employee in lieu of reinstatement to a maximum of 24 months.

7.1.4 Provide all the Complainants with reasonable compensation for legal costs incurred, as well as a remedy, including a reasonable amount to the value of at least one year's annual salary, as settlement for consolatory compensation, to address the financial and emotional distress and trauma experienced by them and their families as a result of the manner in which the matter has been handled by Transnet

8. MONITORING

The Public Protector will require:

8.1 An implementation plan indicating how the remedial action referred to in paragraphs (v) above will be implemented, within 30 days from the date of this report;

8.2 Regular progress reports on the implementation of the remedial action above

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA

DATE: 12/04/2017