

RealTime Transcriptions

TRANSCRIPTION OF THE

COMMISSION OF INQUIRY

SOUTH AFRICAN REVENUE SERVICE

BEFORE COMMISSIONER

THE HONOURABLE MR JUSTICE NUGENT (RETIRED)

ASSISTED BY

PROF M KATZ
MR V KAHLA
MS M MASILO

HELD ON

DAY 13

25 SEPTEMBER 2018

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HELD AT

The Auditorium, 2nd Floor Lifton House, Brooklyn Bridge, 570 Fehrsen Street,
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1 [PROCEEDINGS ON 25 SEPTEMBER 2018]
 2 [09:09] COMMISSIONER: Can I just say a few words
 3 at the outset. You know this Commission comes under
 4 regular abuse. Carried sometimes by at least one of the
 5 media and let me just say immediately I don't mind the
 6 abuse, I tell that people over and over. I'm grown up now,
 7 I've been in conflict for 40 years, abuse me as you wish.
 8 But a lot of it is being directed at counsel and
 9 particularly Advocate Steinberg. It says she's acting
 10 unprofessionally and so forth. I want to just repeat what
 11 I said in a ruling I made as to what counsel's role is.
 12 Advocate Steinberg, Advocate Siyo and Advocate Hobden are
 13 counsel for the Commission and like any other counsel they
 14 take the instructions from their client and I am the
 15 client. What they carry out is carried out on the
 16 instruction of the Commission. They don't go off on a
 17 frolic of their own. They do what is required by the
 18 Commission and that is the role of any advocate and if you
 19 wish to abuse me you may do so but I will not tolerate
 20 abuse of counsel for the Commission who are doing who are
 21 doing their job.
 22 I said before that the Commission's Act makes it
 23 an offence to insult or disparage a Commission, I've said
 24 before I'm not going to be diverted by criminal charges and
 25 so forth along there. But I will be diverted along that

1 course if there is further abuse of counsel. I want to
 2 read to you what I said in my ruling earlier of the role of
 3 counsel. It seems that there are some who don't want to
 4 hear it but I will read it nonetheless. "I think it is
 5 important also to say something of the role of counsel
 6 appointed to assist the Commission who also came in for
 7 insult on that occasion in the course of the submissions.
 8 While often called evidence leaders that is a misnomer.
 9 The process of a Commission of inquiry is inquisitorial
 10 unlike that of a court. That means it must make its on
 11 inquiries, seek out evidence itself and interrogate the
 12 veracity of evidence where that is required. Counsel
 13 appointed by a Commission facilitates the performance of
 14 all those functions under the direction of the Commission.
 15 When oral evidence is to be heard it will be presented to
 16 the Commission by its counsel. Where counsel has no reason
 17 to suspect the veracity of the testimony, and I might add
 18 when the Commission doesn't, counsel play their part by
 19 guiding the witness through the testimony so as to ensure
 20 that relevant testimony is extracted. Where there is
 21 reason to suspect testimony might not be true they play
 22 their part by examining the witness vigorously if that is
 23 required to test its veracity.
 24 Indeed it might be that a witness is called
 25 solely for vigorous examination so as to extract

1 information that the Commission requires and if a witness
 2 has given testimony when there has been no reason to
 3 suspect it might be false and it turns out later that that
 4 might not be the case then the witness is liable to be
 5 recalled and examined more thoroughly. In short the
 6 approach counsel will take to oral evidence will be
 7 dictated by the exigencies of the case. Some cases will
 8 require the witness to be guided, other cases will require
 9 the witness to be interrogated and some cases might require
 10 a bit of both". That is the role of counsel and they do it
 11 under the Commission's direction and if you to, if anyone
 12 wishes to insult me they're welcome to do so but they will
 13 not pass that onto counsel. Secondly it is, as part of
 14 that insult it is said that the Commission does not have an
 15 open mind. I want to say what I said in a judgment in the
 16 appeal court about what is meant by an open mind. That
 17 related to the public protector but it applies as much to a
 18 Commission. That state of mind is one that is open to all
 19 possibilities and reflects upon whether the truth has been
 20 told. It is not one that is unduly suspicious but it is
 21 also not one that is unduly believing. It asks whether the
 22 pieces that have been presented fit into place. If at
 23 first they do not then it asks questions and seeks out
 24 information until they do. It is also not a state of mind
 25 that remains static. If the pieces remain out of place

1 after further inquiry then it might progress to being a
 2 suspicious mind and if the pieces still do not fit into
 3 place then it might progress to a conviction that there is
 4 deceit. How it progresses will vary with the exigencies of
 5 the particular case. One question might lead to another
 6 and that question to yet another and so it might go on.
 7 This is a Commission of inquiry and inquiry means you ask
 8 questions and you ask questions so far as it is necessary
 9 to ask those questions and if it is not considered
 10 necessary to ask a question no questions are asked. The
 11 approach to evidence is not like a double entry bookkeeping
 12 where if one witness is asked one question the next witness
 13 must be asked one question and if one witness is asked 20
 14 questions the next witness must be asked 20 questions.
 15 This is not double entry bookkeeping. This is an inquiry
 16 and one will ask questions so long as questions are
 17 required to be asked. Now Mr Min is present is he?
 18 MR MIN: Yes, Sir.
 19 COMMISSIONER: Will you come forward Mr
 20 Min. Sorry there's counsel here for Mr Massone first of
 21 all who is not present. Do you want to come forward, sorry
 22 Mr Min, if you could just give us a moment. I think you
 23 know we're a bit cramped here.
 24 MR MIN: Of course.
 25 COMMISSIONER: So Mr Massone is not

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1 present, you appear for Mr Massone?
 2 MR MIN: Yes, correct.
 3 COMMISSIONER: And do you want to just
 4 tell my colleagues at least why Mr Massone is not present?
 5 MR MIN: (inaudible).
 6 COMMISSIONER: Thank you, will you do so.
 7 MR MIN: Thank you Sir.
 8 COMMISSIONER: Oh. Mr Min, perhaps you
 9 could excuse us for a minute. Sorry.
 10 MR BABAMIA: Members of the Commission,
 11 counsel for the Commission, Mr Commissioner, good morning
 12 to you.
 13 MS STEINBERG: Morning.
 14 MR BABAMIA: My name is Jawaid Babamia,
 15 I'm from the Johannesburg Bar. I represent Mr Vittorio
 16 Massone. I'm instructed by Tabacks Attorneys. I
 17 understand from correspondence exchanged between you
 18 Commissioner and my attorney that there are two issues that
 19 Mr Massone or rather his legal representative is required
 20 to deal with. The first issue is pertaining to Mr
 21 Massone's absence and the second issue pertains to what
 22 should the Commission do, I understand it to be in the form
 23 of proposals that I ought to make to the Commission on what
 24 it ought to do with the documents that the Commission has
 25 received which the Commission has recently requested or the

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1 Commission has requested on an ongoing basis pursuant to
 2 affidavits that it received. On the first issue on Mr
 3 Massone's absence, Mr Commissioner, there has been
 4 correspondence that has been exchanged. But if I can
 5 simply summarise the position it's as follows.
 6 Mr Massone relocated to Dubai a couple of months
 7 ago and he or rather he's been operating from Dubai for a
 8 couple of months. And he's relocated to Italy from Dubai.
 9 He's been travelling to South Africa on a regular basis of
 10 purposes of this Commission of inquiry. Two particular
 11 periods was the week of the 10th and the 17th of September
 12 and what was always intended was for him to go back on
 13 those particular weekends. His legal representatives
 14 consulted with him on Thursday the 20th of September, the
 15 same day that he was meant to go back to Italy and it
 16 became manifest to his legal representatives that he was
 17 unwell. Mr Massone was advised to receive immediate
 18 medical treatment, he received medical treatment and the
 19 diagnosis of that medical treatment is that -
 20 COMMISSIONER: Well don't tell us the
 21 diagnosis.
 22 MR BABAMIA: No, I'm not going into the
 23 detail of it, by all means, I understand that there is a
 24 confidentiality pertaining to that and we thank the
 25 Commission for respecting that confidentiality. But the

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1 upshot of it rather than the actual diagnosis of it, is
 2 that he requires treatment and that he's unfit to subject
 3 himself to this Commission of inquiry. It's on that basis
 4 that his legal representatives sought for him to be excused
 5 from being present here today. He is in Italy, his legal
 6 representative have had conversations with him to inquire
 7 about his progress as late as yesterday as well and I
 8 understand that his medical practitioners in Johannesburg
 9 are speaking to his medical practitioners in Italy. So to
 10 the extent that we need to communicate with him via
 11 teleconference or emails and the like that is still
 12 possible. So that's on the first issue. In respect of the
 13 documents that -
 14 COMMISSIONER: Well let's just deal with
 15 that issue. I did get a letter from Tabacks I wasn't sure
 16 who they were representing, whether it's Mr Massone or Bain
 17 or because no one's told me anything, no one tells me
 18 anything by the way and it outlined what you said. I
 19 subsequently received a report from his medical
 20 practitioner. I had said that I will not reveal what had
 21 passed between doctor and patient and I have not done so to
 22 my colleagues and I will not do so and in fact that report
 23 has been destroyed.
 24 MR BABAMIA: We thank the Commissioner.
 25 COMMISSIONER: If it emerges in the press

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1 anywhere it doesn't emerge from our office. But I say to
 2 myself well the letter said well please will excuse him and
 3 it seems to me he excused himself, he went back to Italy.
 4 Now the only thing that concerns me a little is shouldn't I
 5 have got a phone call before he went to Italy to be excused
 6 rather than just being told well he's in Italy. It's
 7 nothing for me to excuse him when he's not here because
 8 he's in Italy. So as far as the request to excuse him is
 9 concerned, it seems to me that that's pointless and I don't
 10 excuse him, if he ever comes back and I must say that
 11 reading that report it seems to me very doubtful that he's
 12 going to come back to this Commission, would that be your
 13 view as well?
 14 MR BABAMIA: That would not be my view,
 15 Mr Commissioner. Mr Massone has indicated to his legal
 16 representatives which includes me that he is willing to
 17 participate and to cooperate. The only issue is how
 18 meaningful would his participation be given his condition.
 19 But Mr Commissioner, if you've got to ask that he comes
 20 back you're going to have to accept him with warts and all.
 21 COMMISSIONER: Let me just tell you
 22 something. I don't want to put any person's health at
 23 risk.
 24 MR BABAMIA: Indeed.
 25 COMMISSIONER: We need questions to be

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1 answered and I'm not going to tell him to come back. You
 2 can give him the report. I'm not going to put anyone's
 3 health at risk. It leaves the problem which you can now
 4 get to which is and it's really why Mr Min, and I'll raise
 5 that later and Ms Moodley are here, is that we get dumped
 6 with affidavits and some of which raise lots of questions
 7 and everyone disappears and we are left to say well what do
 8 we make of this. I think that Bain puts itself in a very
 9 dangerous position by the way, quite apart from us - it
 10 being unhelpful for us. Bain itself I don't think
 11 recognises the danger that they face by adopting the
 12 approach they have and you tell us now what do you say we
 13 must do with the affidavits?

14 MR BABAMIA: Mr Commissioner, the
 15 affidavit say what they say. I can appreciate the fact
 16 that they would generate a number of questions and I
 17 understand that they have generated a request for further
 18 documents which have been submitted to the Commission as
 19 well. There are one of two ways of really dealing with
 20 this matter and this is really a proposal that I'm making
 21 and I'm making the proposal on instruction from my attorney
 22 after having discussed it with my attorney and the rest of
 23 the legal team. The Commission may direct questions to Mr
 24 Massone in, with respect to any particular documents that
 25 they wish to. I know that is quite a laborious task, I

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1 mean I understand that the Commission has recently received
 2 documents that fill up some 24 lever arch files and I
 3 understand that the affidavit together with the annexure
 4 are constituted by something like two and a bit lever arch
 5 files. But what the legal representatives will happily do
 6 is that they will consult with Mr Massone and submit
 7 written responses to -

8 COMMISSIONER: Sorry, who's in charge of
 9 that camera? Do you think you could just turn the light a
 10 little away? It's shining right in my eyes and I can't
 11 see. Thanks very much. Yes.

12 MR BABAMIA: The legal representatives of
 13 Mr Massone will happily submit written responses to any
 14 inquiries that are directed. To the extent and Mr
 15 Commissioner, I've heard your ruling, I understand the
 16 purpose of the Commission and I understand the purpose of
 17 the counsel for the Commission as well and to the extent
 18 that you think that there may be a need for Mr Massone to
 19 subject himself to examination on broad issues, narrow
 20 issues, whatever the Commission determines would be
 21 necessary well we could take that up and we could assess
 22 the feasibility of something like that transpiring. But be
 23 rest assured that Mr Massone holds himself available to the
 24 extent that the Commission wants to see him. I just need
 25 to add this as well, Mr Commissioner, I mean I understand

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1 the frustration that commissions of inquiry undergo and I
 2 understand your frustration in this matter as well.

3 COMMISSIONER: I'm not frustrated at all,
 4 don't assume that. I just get on with the job as best I
 5 can. But anyway -

6 MR BABAMIA: That may be the case. But
 7 Mr Massone has made himself available by commuting to South
 8 Africa on a number of occasions and like I said he would be
 9 willing to do so if it's achievable and if it's feasible
 10 from a health perspective. So in a nutshell we're in the
 11 Commission's hands and we're happy to assist the Commission
 12 to the extent that it wants to direct written inquiries to
 13 Mr Massone's legal representatives and we will submit
 14 written responses.

15 COMMISSIONER: Well let me just tell you
 16 that we are not, this Commission has got a lot of work to
 17 do. I don't know if you've seen it's terms of reference.
 18 They are very broad. This Commission has been working
 19 night and day, seven days a week to try and get through it.
 20 We are not going to waste our time with written questions
 21 which come back. I'll show you some of the type of
 22 questions I'll ask and I'll show you the kind of answers I
 23 get. So what I want to know is that the affidavits are
 24 now, have been submitted to the Commission and they're in
 25 the possession of Advocate Steinberg and they will be

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1 placed before the Commission by her today. Do you have any
 2 difficulty with that?

3 MR BABAMIA: I don't have any difficulty
 4 with that, the affidavits say what they say.

5 COMMISSIONER: Exactly.

6 MR BABAMIA: Like I say they do generate
 7 questions and to the extent that Mr Massone is not here to
 8 answer those questions it is what it is.

9 COMMISSIONER: I understand the offer but
 10 as I said to you, my own opinion is that there's no
 11 prospect of Mr Massone will come back. It may well be that
 12 he would be willing to but quite frankly I, unless he comes
 13 back saying I'm fit and strong and ready to go through
 14 whatever is necessary which he won't be able to do, I'm
 15 sure you accept and we're not doing it by emails and video
 16 calls and everything. We want someone to talk to, I've
 17 been telling Bain that for I don't know how long and we'll
 18 talk to Mr Min. Bain goes about its own inquiry, it must
 19 do it as it wishes. But it mustn't prescribe to us as to
 20 how we conduct our inquiry and I've been saying to Bain all
 21 the time we want, the way we go about the inquiry we want
 22 documents and we want a person. Not things that are
 23 submitted from afar. Anyway thank you very much. I'm sure
 24 you can't take it any further.

25 MR BABAMIA: That is correct. Thank you.

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1 COMMISSIONER: Thank you very much and
 2 counsel is also here to, it's on a watching brief as it
 3 were for Bain, is that right?
 4 Mr MCNALLY: That is correct, Mr
 5 Commissioner. Paul McNally.
 6 COMMISSIONER: Paul McNally for the
 7 record yes. Thank you, Mr Min. Mr Min would you -
 8 MR MIN: Morning.
 9 COMMISSIONER: Do you affirm that the
 10 evidence you'll give will be the truth, the whole truth and
 11 nothing but the truth?
 12 MR MIN: I do.
 13 EVIDENCE OF MR MIN
 14 COMMISSIONER: So, thank you very much.
 15 Mr Min, you've heard what I've said, we're left in an
 16 unfortunate position. We've had affidavits given to us,
 17 they raise many questions and we don't know who to ask
 18 anymore. Mr Massone is not here. We, I get letters from
 19 counsel all the time, they don't even tell me who they
 20 representing when they write letters and we just want to
 21 know who to ask now. So I've asked you to come here so we
 22 can just go through how we got to this position and where
 23 the shortfall is that we're concerned about and as I've
 24 said to you we'll go through it in a minute. Bain is,
 25 should be very circumspect about its own position. If we

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1 are left with facts not all explained we are going to have
 2 to come to a conclusion of Bain's role in all this and it
 3 might be that we will then have to simply draw inferences
 4 because we don't have other facts and we are very capable
 5 on these, what we've seen thus far, a real possibility that
 6 one might make very strong inferences against Bain. Now it
 7 mustn't complain if we do that and they haven't put
 8 information before us. You understand that?
 9 MR MIN: I do, Sir.
 10 COMMISSIONER: Mr Min, just to be
 11 correct, you are general counsel for Bain and you are from
 12 Boston, is that right?
 13 MR MIN: Yes, Sir.
 14 COMMISSIONER: Where are these bundles of
 15 documents, the set of documents. Is the secretary here?
 16 MR MIN: Yes.
 17 COMMISSIONER: Won't you give one to Mr
 18 Min and you have each got one.
 19 [09:29] I want to go through some documents with you, Mr
 20 Min, and tell you what is - I want to just show you what
 21 concerns me and I want to start with the first document
 22 which is a letter that I wrote to Bain & Company on the 3rd
 23 of September. It was after Mr Massone had given his
 24 evidence and it had emerged that he had been in contact
 25 with Mr Moyane before this contract was awarded and before

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1 Mr Moyane was the Commissioner. And we said here "Would
 2 you also kindly furnish me with the report prepared by Mr
 3 Moyane referred to in the evidence of Mr Massone? I would
 4 be obliged if Mr Massone would also depose to an affidavit
 5 identifying and describing each occasion he or any other
 6 person from Bain & Co met or had contact with Mr Moyane
 7 before the contract was awarded to Bain & Co? The
 8 affidavit should identify four things. One, when and where
 9 the contact occurred, two, who initiated the contact,
 10 three, what was discussed on each occasion and four, in the
 11 next paragraph whether any discussions took place between
 12 Bain & Company and Mr Moyane concerning its tender at any
 13 time." So you'll see there were four things that were
 14 asked.
 15 MR MIN: Yes, Sir.
 16 COMMISSIONER: Now he was required to
 17 give that affidavit by Friday which was the 7th of
 18 September. Now you and Ms Moodley asked to see me on the
 19 Wednesday before that and you came to Pretoria -
 20 MR MINS: Your Honour, I believe it was
 21 Friday the 7th of September -
 22 COMMISSIONER: Sorry.
 23 MR MINS: I believe it was Friday the 7th
 24 of September, not the 27th of September.
 25 COMMISSIONER: Sorry I said 7 September.

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1 MR MINS: Oh sorry, apologies.
 2 COMMISSIONER: And you came to see us on
 3 the Wednesday I think it was, it doesn't matter precisely
 4 what day, it's not going to - but I think it was Wednesday.
 5 You saw Ms Hobden and I.
 6 MR MINS: Yes.
 7 COMMISSIONER: And you came there to ask
 8 for an extension of time -
 9 MR MINS: Yes.
 10 COMMISSIONER: - to file the affidavit.
 11 MR MINS: That's correct.
 12 COMMISSIONER: You said you needed an
 13 extension of time in order to first go through all your
 14 documents and see what your documents told you and so forth
 15 before Mr Massone would give an affidavit, correct?
 16 MR MINS: Correct.
 17 COMMISSIONER: And we refused that
 18 extension, correct?
 19 MR MINS: Correct, Sir.
 20 COMMISSIONER: We said to you we see no
 21 difficulty with Mr Massone making an affidavit telling us
 22 what he could recall and if he needed thereafter, when he
 23 saw his documents, to explain something, expand or whatever
 24 he could file a supplementary one, isn't that correct?
 25 MR MINS: That is correct, Sir.

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1 COMMISSIONER: So in response to that on
 2 Friday – we had also asked for this report. Now on Friday,
 3 sorry also on Wednesday the 7th of September, you'll see on
 4 page 4, you'll see that we are asking for the report, "We
 5 confirm having advised that Judge Nugent urgently awaits
 6 receipt of the report." Do you see that?
 7 MR MINS: Yes, Sir.
 8 COMMISSIONER: And eventually we said on
 9 the next page at 5, "Commissioner Judge Nugent insists that
 10 you furnish the report with or without the statement
 11 immediately failing which you'll be summonsed to produce
 12 it." Because your reply had been, at the foot of page 5,
 13 "The statement contains important information that provides
 14 context to the report hence we will be sending both
 15 together by this afternoon." Your attitude was the report
 16 should not get to us without the statement, correct?
 17 MR MINS: We believed that the statement
 18 would be ready shortly, Sir and so we wanted to send them
 19 both in together.
 20 COMMISSIONER: Yes as I said to you your
 21 view was that the report should come in with the statement.
 22 MR MINS: Yes, Sir.
 23 COMMISSIONER: Now we did not ask for the
 24 report with the statement, we said give us the report which
 25 you had in your possession at that time, correct?

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1 MR MINS: Correct.
 2 COMMISSIONER: Why couldn't you just send
 3 us the report as we had asked for?
 4 MR MINS: We could have, Sir, we thought
 5 that the statement would be ready momentarily and that we
 6 thought it would be beneficial if we submitted the two
 7 documents together.
 8 COMMISSIONER: That's what you thought,
 9 my question is why didn't you do what we asked for and that
 10 is give us the report? We didn't say wait until you got
 11 the statement. Why does Bain think that it should now
 12 decide how the Commission should go about its work?
 13 MR MINS: I think that was just a
 14 judgement call we made, Sir, at the time.
 15 COMMISSIONER: You made a judgement call
 16 that although I'd asked for the report Bain should say
 17 I'll only give you the report when I've got the statement,
 18 correct?
 19 MR MIN: Yes, Sir.
 20 COMMISSIONER: We received the statement
 21 and the report as you'll see from page 6, "Please find
 22 attached the statement and report." And the report appears
 23 on page 7. Now meanwhile I'd said to Bain look I
 24 understand that Mr Massone is in Europe, I don't expect him
 25 to have to go and find an embassy in which to attest the

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1 statement, give us the statement and he can attest it when
 2 he comes back, correct?
 3 MR MIN: Correct.
 4 COMMISSIONER: So the document we've got
 5 at page 7 came back, it goes from 7 to 12, came back
 6 unsigned which was fine, but this was a statement of Mr
 7 Massone that he was going to attest to.
 8 MR MIN: Correct, Sir.
 9 COMMISSIONER: And he had been asked, as
 10 we now understand it, to give his recollection of having
 11 met Mr Moyane, correct?
 12 MR MIN: Correct.
 13 COMMISSIONER: And what we get back is a
 14 statement that tells us that Bain & Company welcomes the
 15 opportunity to engage with the Commission and it goes on in
 16 paragraph after paragraph to say that he went abroad, that
 17 he did this and that and the other. He doesn't have a
 18 clear recollection and he'll then go on telling us how
 19 difficult it is to find all the documents, etcetera which
 20 is not what we were asking, we asked for him to tell us his
 21 recall of meeting Mr Moyane, correct?
 22 MR MIN: Yes, Sir.
 23 COMMISSIONER: And then go to page 11.
 24 What we get of his recall is one line, two lines sorry. In
 25 paragraph 16, do you see it? "I am in the process of

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1 trying to establish full details of contacts with Mr Moyane
 2 prior to the tender being awarded. But at this stage I
 3 recall that prior to Mr Moyane becoming Commissioner of
 4 SARS I had been introduced to him. In broad terms we
 5 worked on providing him with what can best be described as
 6 high level executive coaching, support and mentoring in
 7 order to assist him to develop." That's the long and the
 8 short of what his recall was apparently.
 9 MR MIN: Yes, Sir.
 10 COMMISSIONER: Because that's all that
 11 appears.
 12 MR MIN: Yes, Sir.
 13 COMMISSIONER: One, I was introduced to
 14 him and secondly broadly we went into high level executive
 15 coaching. Now since then we've had his affidavit and we
 16 know that he met on eight occasions with Mr Moyane. Some
 17 of them were at the offices of Bain where presentations
 18 were made, correct?
 19 MR MIN: Yes, Sir.
 20 COMMISSIONER: Those were eight occasions
 21 and I wrote to you on the next day and I said to you, I
 22 referred to this statement and report "I'm refusing your
 23 request for an extension of time so as to consult your
 24 records, you're advised that Mr Massone should attest now
 25 to what he recalls and may supplement his affidavit should

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1 he consider it necessary. I regret that I do not consider
 2 the statement of Mr Massone to reflect cooperation with the
 3 Commission. Kindly advise me by return whether I am to
 4 understand the statement to mean he has no present recall
 5 of having met Mr Moyane to discuss SARS? Or whether I am
 6 to understand it to mean he refuses to respond to the
 7 request." Do you see that?
 8 MR MIN: Yes, Sir.
 9 COMMISSIONER: "If it is the former i.e.
 10 if he's saying he has no present recall of having met Mr
 11 Moyane to discuss SARS would he kindly say so explicitly
 12 when he attests to the statement?" Do you see that?
 13 MR MIN: Yes, Sir.
 14 COMMISSIONER: "If it is the latter could
 15 he kindly explain his refusal?" It then says at the foot
 16 "It appears to me that the document furnished is not the
 17 full and only report, kindly let me have by the same time
 18 all reports, in full, prepared by Mr Moyane in relation to
 19 SARS." Do you see that?
 20 MR MIN: Yes, Sir.
 21 COMMISSIONER: Okay so –
 22 MR KAHLA: Four.
 23 COMMISSIONER: Prepared in full –
 24 MR KAHLA: For –
 25 COMMISSIONER: Sorry.

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1 MR KAHLA: For Mr Moyane.
 2 COMMISSIONER: For Mr Moyane yes, for Mr
 3 Moyane. Thank you. And I at the same issued a subpoena to
 4 Mr Massone to come and give evidence today, correct?
 5 MR MIN: Correct, Sir.
 6 COMMISSIONER: Now the day after that, on
 7 the 9th of September, Bain & Company issued a press
 8 statement, you've got that at page 15. Do you see that?
 9 MR MIN: Yes, Sir.
 10 COMMISSIONER: Now in the fifth paragraph
 11 "We continue to cooperate voluntarily with the Nugent
 12 Commission of Inquiry." We know that by that time you have
 13 not given us the report that you asked for, initially you
 14 said we must wait for the statement, correct?
 15 MR MIN: Yes, Sir.
 16 COMMISSIONER: That was not cooperation
 17 with the Commission was it? We had asked for the report
 18 and you hadn't given it to us even though you had it in
 19 your possession, correct?
 20 MR MIN: We did produce the report with
 21 the statement shortly thereafter, shortly after the request
 22 that we received.
 23 COMMISSIONER: But we've been through
 24 that, we asked for the report.
 25 MR MIN: Yes, Sir.

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1 COMMISSIONER: And Bain had said we'll
 2 give you the report in due course, you're waiting until you
 3 got the statement.
 4 MR MIN: I believe it was within an hour
 5 or so of the emails requesting the report, Sir.
 6 COMMISSIONER: How long did it take you
 7 to find that report?
 8 MR MIN: We had it in our possession,
 9 Sir.
 10 COMMISSIONER: You'd had it in your
 11 possession for a week.
 12 MR MIN: Yes, Sir.
 13 COMMISSIONER: From Monday to Friday and
 14 in that time you hadn't given us the report, correct?
 15 MR MIN: No, Sir, that's correct.
 16 COMMISSIONER: Secondly we had asked for
 17 a statement of his recall and all we had got he's saying,
 18 "I remember being introduced to him and we talked about in
 19 broad terms this," – yet we knew that eight times he had
 20 met him if you ask me whether I accept that out of those
 21 eight periods, which we will refer to just now, he could
 22 not recall one of them, I'm afraid I'm too sceptical to
 23 accept it.
 24 MR MIN: Sir, I don't believe he was
 25 aware of the full eight meetings at the time he made that

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1 statement. That was as a result of the additional forensic
 2 investigation that had been done.
 3 COMMISSIONER: We'll come to that, but
 4 are you saying to me, must I believe that from those eight
 5 meetings he had no independent recall of any of them?
 6 MR MIN: I cannot answer for Mr Massone,
 7 Sir.
 8 COMMISSIONER: Right the second thing in
 9 your press statement. You say, where's it about the money,
 10 "Bain & Company's global board proved to set aside all of
 11 this 164 million of fees plus VAT and interest from our
 12 work with SARS. This money will be used either as
 13 prescribed by the Nugent Commission of Inquiry or in the
 14 absence of such prescription, for the benefit of South
 15 Africa etcetera. Now no one has ever written to us and
 16 Bain has never told us officially that this money is
 17 available. Why not? I would have thought that you have
 18 told us at some stage.
 19 MR MIN: I believe the press statement
 20 accomplished that, Sir.
 21 COMMISSIONER: You mean that you expect
 22 the Commission to go and look at a press statement to find
 23 out that money is going to be made available that we have
 24 to decide where it should go. Are you seriously telling me
 25 that you expected the Commission to find that out from a

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1 press statement?

2 MR MIN: That probably was an oversight

3 on our part, Sir, we had not yet determined exactly what we

4 intended to do with the money. The important part was that

5 we were setting it aside and making sure that it would be

6 separate and not returned to Bain & Company, so –

7 COMMISSIONER: Yes but it would be made

8 available to the Commission to decide what should happen to

9 it, not made available physically, but the Commission would

10 decide what would happen.

11 MR MIN: That was one of the options. We

12 didn't know what the findings of the Commission would be,

13 to what extent it would prescribe possible remedies and so

14 we were simply holding that open as an option.

15 COMMISSIONER: So you're holding it as an

16 option until we have completed our inquiry, is that the

17 idea?

18 MR MIN: Yes, Sir.

19 COMMISSIONER: So the money is not

20 available to the Commission to decide what it's going to

21 do, but it depends what the outcome is, is that the point?

22 MR MIN: Yes, Sir.

23 COMMISSIONER: Why didn't you say that

24 here, tell the public this money is actually not available

25 for the Commission to decide, the money will become

Page 2152

1 available once we find out what the Commission decides?

2 Because that's now what happened, you're not suggesting

3 that this is what it reflects, that this money will be

4 available to the Commission conditionally, conditional upon

5 what it finds. That's what in fact your offer was,

6 correct?

7 MR MIN: Yes, Sir.

8 COMMISSIONER: So this money, the public

9 believes this money is going to be paid and in fact we

10 don't know yet that it will be paid, correct?

11 MR MIN: What we are certain of, Sir, is

12 that the money has been set aside by Bain & Company, it

13 will be paid, the exact form of payment, to whom it goes

14 that is something that is yet to be determined. But it

15 will be paid, Sir.

16 COMMISSIONER: But it awaits and depends

17 on the outcome of the inquiry.

18 MR MIN: That as one of the factors we

19 wanted to take into account in making a decision with what

20 we do with the money.

21 COMMISSIONER: Yes you didn't say that is

22 one of the things, you said, "it will be used as prescribed

23 by the Nugent Commission of Inquiry," not dependent on the

24 outcome. But your first option is that the Commission

25 would decide, but in fact that's not the case, it's

Page 2153

1 conditional, correct?

2 MR MIN: It was our attempt, Sir, to say

3 that if there were findings by the Commission that

4 indicated that the money should be spent in a certain way

5 we would obviously honour that.

6 COMMISSIONER: It was conditional,

7 correct?

8 MR MIN: The payment of the money away

9 from Bain & Company is not conditional, Sir, that is

10 absolute, it will take place.

11 COMMISSIONER: And when will it take

12 place?

13 MR MIN: When there is a final

14 determination of all the facts and we can determine what is

15 the best use of that money.

16 COMMISSIONER: So it is conditional upon

17 you determining once we are finished on the best use of

18 that money, is that correct?

19 MR MIN: In consultation with a broad

20 group of constituents within South Africa.

21 COMMISSIONER: That may well be so, but

22 it's conditional upon you being satisfied as to how it will

23 be spent once the Commission has reached its conclusion.

24 Is that correct?

25 MR MIN: Yes, Sir, but we have made an

Page 2154

1 absolute commitment that the money will be paid.

2 COMMISSIONER: Yes. If I ask you

3 questions will you kindly answer them and then you can

4 explain afterwards. You've got the full right to tell me

5 anything you want to know, but when I ask the question I'd

6 like an answer directly first.

7 MR MIN: Yes, Sir.

8 COMMISSIONER: Now I understand that

9 there have been discussions with SARS now at another

10 meeting with Bain. I said look this money came from SARS,

11 it's not for us to decide what should happen to money from

12 SARS and there have been discussions with SARS.

13 MR MIN: Yes, Sir.

14 COMMISSIONER: But there has been no

15 unconditional offer to SARS to pay the money either.

16 MR MIN: That's correct, Sir.

17 COMMISSIONER: So if the public thinks

18 that this money is now being repaid they are completely

19 incorrect. It might be paid, it might not be paid.

20 Correct?

21 MR MIN: In my opinion, Sir, it will be

22 paid, we just don't know to whom.

23 COMMISSIONER: Or on what conditions and

24 you're setting the conditions.

25 MR MIN: But the ultimate payment will be

Page 2155

1 made, Sir.

2 COMMISSIONER: But Bain is setting the

3 conditions.

4 MR MIN: We will take into account all

5 the factors, once we have the facts.

6 COMMISSIONER: I understand you will. My

7 question is Bain will decide whether the conditions are

8 suitable to it. Is that correct?

9 MR MIN: Ultimately yes, Sir.

10 COMMISSIONER: Now if you go to the 1, 2,

11 3, 4, 5, 6th paragraph. To reinforce the independence of

12 the investigation we have established an oversight

13 committee made of senior global Bain partners, Athol

14 Williams, a Bain alumnus and a respected independent

15 advisor will chair this committee.

16 MR MIN: Yes, Sir.

17 COMMISSIONER: Now I understand from Mr

18 Williams there has not been such a committee.

19 MR MIN: We are in the process of putting

20 it together.

21 COMMISSIONER: But you've finished your

22 investigation haven't you?

23 MR MIN: No, Sir, not our internal

24 investigation.

25 COMMISSIONER: When are you going to –

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1 but you've been very busy with this investigation.

2 MR MIN: Yes, Sir –

3 COMMISSIONER: Not under the oversight of

4 a committee because it hasn't yet been established.

5 MR MIN: Correct.

6 COMMISSIONER: But that's also correct

7 that you have established an oversight committee, in fact

8 you haven't established an oversight committee. Is that

9 correct?

10 MR MIN: We are in the process of

11 establishing it.

12 COMMISSIONER: Would you just answer the

13 question?

14 MR MIN: Yes, Sir.

15 COMMISSIONER: Is it correct that you

16 have not established an oversight committee?

17 MR MIN: As of today that is correct,

18 Sir.

19 COMMISSIONER: Just a question, third

20 paragraph "We have learnt in the first week of the

21 investigation that our engagement with SARS fell short of

22 our operating principles." In what way did it fall short

23 of your operating principles?

24 MR MIN: Two things on that, Sir, first

25 of all this version of the press release was actually an

Page 2157

1 incorrect version.

2 COMMISSIONER: Did it go out to the

3 press?

4 MR MIN: Excuse me.

5 COMMISSIONER: Did it go out to the

6 press?

7 MR MIN: Yes this did go out, this did go

8 out, but there was an internal mistake that we had made and

9 I believe that you have been sent the version of September

10 10 which was the version that was actually approved for

11 issuance by Bain & Company.

12 COMMISSIONER: But the 9th of September

13 one went out.

14 MR MIN: It did, it did.

15 COMMISSIONER: And that was incorrect.

16 MR MIN: It did and we issued a

17 clarification once we sent out the correct press release.

18 COMMISSIONER: Perhaps I've missed the

19 one of the 10th then. Well I'll look at that and we'll come

20 back to that.

21 MR MIN: Because it does correct actually

22 that language in particular.

23 COMMISSIONER: Yes we'll come back to

24 that.

25 MR MIN: With respect to your specific

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1 question of the operating principles this was a reference

2 to our admission statement where our first principle is we

3 create higher economic value for our clients. That is our

4 guiding mission for Bain & Company and under the

5 circumstances as we said in the same release we did not in

6 fact generate sustainable results. And so we felt we did

7 not actually that very first key principle of our operating

8 principles.

9 COMMISSIONER: Well we'll come to that

10 when I've seen the other press statement. Now you wrote me

11 then a long letter, page 16, 17, 18, 19. Now if don't mind

12 I'm not going to go through all this because you and I can

13 spend a morning dealing with this letter by the way. But

14 you do say in the second paragraph for example, you see

15 there are lots of paragraphs marked. "I regret if you

16 interpreted the statement submitted by Mr Massone as a

17 failure to cooperate. We have provided several written

18 submissions and Mr Massone testified before the Commission

19 on a voluntary basis." What you omit there though is that

20 he didn't make full disclosure on a voluntary basis. There

21 was nothing in any of the submissions that were made before

22 his evidence to tell us that he had been seeing Mr Moyane,

23 correct?

24 MR MIN: Correct, Sir.

25 [09:49] COMMISSIONER: So what he gave us

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1 voluntarily was what Bain wanted us to hear, not thing that
 2 Bain did not want us to hear. Would that be fair?
 3 MR MIN: No, Sir, we were answering very
 4 specific questions that had been given to us by the
 5 Commission up until that point in time. All those
 6 questions, up to and including the first day of Mr
 7 Massone's testimony related to the quality and nature of
 8 our work and that was the focus of all of the voluntary
 9 submissions that we had made as well as the testimony of Mr
 10 Massone.
 11 COMMISSIONER: Yes, but before he gave
 12 his testimony Bain and Company actually approached us and
 13 said we would like to make submissions.
 14 MR MIN: Yes, Sir.
 15 COMMISSIONER: Certain questions arose
 16 from the submissions that were made but nothing was ever
 17 disclosed in those submissions about the meetings with Mr
 18 Moyane. Correct?
 19 MR MIN: That's correct, Sir.
 20 COMMISSIONER: So when you say you made
 21 submissions voluntarily, what you made was submissions that
 22 Bain wanted to make voluntarily.
 23 MR MIN: They –
 24 COMMISSIONER: But not the submission
 25 that you'd been meeting Mr Moyane. Correct?

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1 MR MIN: The submissions that we believe
 2 were relevant to the questions that were posed to us by the
 3 Commission.
 4 COMMISSIONER: And did you not think it
 5 relevant to the initial submissions you made, forget about
 6 the questions we posed, did you not think it relevant to
 7 the initial submissions that we should know that there had
 8 been all these meetings with Mr Moyane?
 9 MR MIN: Sir, if you look at Mr Massone's
 10 testimony and his affidavits about the initial meetings
 11 with Mr Moyane and the descriptions of the executive
 12 coaching that he used with Mr Moyane and how that was
 13 consistent with the approach that we have taken with public
 14 sector senior executives, it was actually in that spirit
 15 that he approached, or at least what he told us that was
 16 the spirit in which conducted those meetings.
 17 COMMISSIONER: Mr Min, I won't forget the
 18 question. The question was did you not think it was
 19 relevant when you made, first made your submissions to
 20 disclose that you'd been meeting Mr Moyane?
 21 MR MIN: We did not believe it was
 22 related to the procurement process, Sir, and so we,
 23 therefore we did not believe it was relevant.
 24 COMMISSIONER: You didn't, and yet when
 25 it emerged from his evidence all that emerged from his

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1 evidence is yes, I met Mr Moyane and I made a report for
 2 him. Just on that evidence Bain called all its partners,
 3 came scurrying from around the world, why did you think it
 4 was relevant then that you should do all of that once –
 5 it's not – you obviously thought it was very, very
 6 relevant.
 7 MR MIN: Yes, Sir, at that point it came
 8 out and one Mr Massone had testified about the meetings so.
 9 COMMISSIONER: Once he told us it became
 10 very relevant to Bain, correct?
 11 MR MIN: Yes, Sir.
 12 COMMISSIONER: But beforehand it wasn't
 13 relevant.
 14 MR MIN: We were not aware of the extent
 15 of the meeting, Sir.
 16 COMMISSIONER: I'm not talking about the
 17 extent of the meeting. Bain had come – when you say we
 18 were not, Mr Massone was aware of the meetings.
 19 MR MIN: Ja -
 20 COMMISSIONER: So why do we hear from we,
 21 it's Mr Massone.
 22 MR MIN: I can't -
 23 COMMISSIONER: And you say it was not
 24 relevant.
 25 MR MIN: I can't answer on behalf -

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1 COMMISSIONER: Okay.
 2 MR MIN: - of Mr Massone, Sir.
 3 COMMISSIONER: But your answer was you
 4 didn't think it was relevant, Bain didn't think it was
 5 relevant. Did Bain in Boston know about these meetings?
 6 MR MIN: No, Sir. Not – no, Sir.
 7 COMMISSIONER: Okay. Now you were asked
 8 as well, you replied as well in this letter to why it was
 9 that we only got the one report when in fact you had a
 10 number of reports in your possession. Your answer is on
 11 page 17, the last paragraph, the third line. In your
 12 letter to Ms Moodley you asked that we furnish you with a
 13 copy of the report prepared for Mr Moyane "referred to in
 14 the evidence of Mr Massone. We reviewed Mr Massone's
 15 testimony before the Commission and concluded that your
 16 letter was referring to the outside-in report about SARS
 17 prepared on the basis". Are you saying to me, look, you
 18 only asked for that report, we knew there were others but
 19 we thought no, the Commission doesn't want the others? Is
 20 that what you are saying?
 21 MR MIN: No, Sir, we said we were going
 22 to submit the additional reports in due course.
 23 COMMISSIONER: No, let's read that. "We
 24 reviewed his testimony and concluded that your letter was
 25 referring to the outside-in report and that's why we only

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1 got that". That's what you are saying, correct?

2 MR MIN: Yes, Sir.

3 COMMISSIONER: Did you really think and

4 must I accept that you really think that the Commission

5 which only knew of one report was actually not interested

6 in the others although Bain had them? Is that what you are

7 saying?

8 MR MIN: But we did submit them with this

9 letter, Sir.

10 COMMISSIONER: You must answer my

11 questions, Mr Min. Did you really think that the

12 Commission was not interested in the other reports?

13 MR MIN: I'm sure they were relevant to

14 the Commission.

15 COMMISSIONER: And why didn't you then

16 just give them to us instead of us having to prise them out

17 of you?

18 MR MIN: We were being responsive to the

19 direct question we were given.

20 COMMISSIONER: Yes, you only answered the

21 direct question, you know that you've got other relevant

22 documents and you don't disclose them. Is that correct?

23 MR MIN: We did disclose them, Sir.

24 COMMISSIONER: No. At the outset, you

25 only disclosed them when I asked for them pertinently. But

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1 before then you said well Nugent only asked for one

2 document, I know there are another four that are relevant

3 but I'll only give him the one document. That's what you

4 are saying here, correct?

5 MR MIN: At the time we provided it -

6 COMMISSIONER: Yes.

7 MR MIN: - on the 7th and -

8 COMMISSIONER: So now we have got more

9 non-disclosure by Bain? First we don't get disclosure of

10 anything at all, then we get disclosure of one report when

11 you've got four and you know they're highly relevant. So

12 relevant that you've got all your partners coming from all

13 over the world in response to our knowledge of this. You

14 don't have to answer that. Now page 19, we get the

15 reiteration. "I reiterate that Bain intends to cooperate

16 fully with the Commission in an open and transparent

17 manner". Now do you think that was cooperating with the

18 Commission in an open and transparent manner, is that

19 Bain's interpretation of an open and transparent manner?

20 MR MIN: We believe we were in good faith

21 making every effort to cooperate, Sir.

22 COMMISSIONER: Even though you hadn't

23 replied to what the Commission had asked for? You hadn't

24 done what the Commission had asked.

25 MR MIN: We believe we were responding

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1 directly to questions that were asked to us by the

2 Commission.

3 COMMISSIONER: Even though you had not

4 done what the Commission asked for, is that correct? And

5 you still say that's cooperation.

6 MR MIN: In our opinion, Sir, we were

7 making a good faith effort given the volume of documents we

8 were reviewing at the time to provide as much information

9 as we could with a commitment to continue to provide

10 information to the Commission which we did.

11 COMMISSIONER: On Bain's terms, not on

12 the Commission's terms. What Commission asked for we don't

13 worry about that, we do what Bain wants to do. We'll

14 respond in our way, not yours, Mr Commissioner. Is that

15 correct?

16 MR MIN: No, Sir, we were doing our best

17 to organise a systematic search of a significant amount of

18 information and doing our best to collect that and provide

19 it to the Commission as soon as it was available.

20 COMMISSIONER: Yes. Now I wrote to you

21 on the 20th in response to that. Sorry, on the 10th is it?

22 MR MIN: Yes.

23 COMMISSIONER: Page 20. And I said to

24 you, you know, Bain and Co, "I'm sure you want to protect

25 yourselves and that's fine with me. I would expect that

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1 the end point of each of our endeavours will be the same

2 which is to establish the truth of what occurred. But our

3 methodology might be different. As far as the methodology

4 of the Commission is concerned it matters not whether it

5 receives information piecemeal. We will gather all the

6 information available, if necessary over time and consider

7 it all once we are satisfied we have that available. If

8 evidence is required then what is required is that person's

9 evidence and not a presentation by Bain". We're saying to

10 you, you do your work your way and leave us to do our work

11 our way and our way is to say don't wait till you've

12 collected it all together, give it to me piecemeal, we

13 don't mind. You see that?

14 MR MIN: Yes, Sir.

15 COMMISSIONER: And that is what we've

16 been asking for.

17 MR MIN: Yes, Sir.

18 COMMISSIONER: Give it to us piecemeal if

19 necessary, correct?

20 MR MIN: Yes, Sir.

21 COMMISSIONER: And you were saying no, I

22 must go it all together before I'll give it to you,

23 correct?

24 MR MIN: We responded, Sir, by having Mr

25 Massone submit his affidavit on the 17th as requested. We

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1 submitted additional affidavits from other Bain employees
 2 that had knowledge of the meetings. We did that in
 3 compliance with the timetable that you had given us, Sir.
 4 And then we submitted the balance of the documents by
 5 September 21st I believe as you had requested. So we – so
 6 in that respect, Sir, we were feeding the information,
 7 giving the information to you as soon as it was available
 8 in accordance with your timetable after we had received
 9 this letter.

10 COMMISSIONER: No, that's not correct.
 11 We asked for the report, you said wait until you've got the
 12 statement. We asked for the affidavit of Mr Massone, you
 13 said hang on, we're going to collect all our documents
 14 together first. You're saying to us you might do it
 15 piecemeal, we do it differently and you do it our way.

16 MR MIN: I was referring to, Sir, after
 17 the period after this September 10th letter that you just
 18 read from.

19 COMMISSIONER: I said we still require
 20 the affidavit -

21 MR MIN: Which we submitted.

22 COMMISSIONER: Of course you did, I
 23 didn't suggest you didn't. No you did eventually submit
 24 the affidavit.

25 MR MIN: Yes, Sir.

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1 COMMISSIONER: And you had collected all
 2 the information you needed and you thought well now I
 3 prepare the affidavit. Correct?

4 MR MIN: We were preparing it in
 5 accordance with the timetable -

6 COMMISSIONER: Yes.

7 MR MIN: - you had given you us.

8 COMMISSIONER: And you were collecting
 9 your documents and you sent it to us when you felt you had
 10 gone through all your documents and now that's what you
 11 could disclose to us, correct?

12 MR MIN: No, we were doing it to comply
 13 with the Commission's timetable, Sir -

14 COMMISSIONER: You were doing -

15 MR MIN: - that you had given us.

16 COMMISSIONER: You were doing it by
 17 collecting all your documents first and then saying when
 18 I've got all my documents then I'll give you the affidavit,
 19 correct?

20 MR MIN: I believe Mr Massone submitted
 21 his affidavit on the 17th, we continued the document
 22 collection process throughout that entire week and only
 23 completed it on Friday towards the end of the day and
 24 rushed it over to the Commission in compliance with the
 25 timetable we had been given.

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1 COMMISSIONER: And in that affidavit you
 2 had now completed your document review, correct?

3 MR MIN: No, Sir, that was still
 4 continuing throughout the week of the 17th.

5 COMMISSIONER: Yes.

6 MR MIN: So Mr Massone submitted his
 7 affidavit on the 17th as you had requested, we were
 8 continuing the document review the entire week of September
 9 17th and then delivered them to the Commission on Friday the
 10 21st.

11 COMMISSIONER: Yes and then I asked you,
 12 we have to go through that, can I have your assurance that
 13 Mr Massone will be in the country and be before the
 14 Commission on the 25th and you said well I've instructed him
 15 to do so. Well -

16 MR MIN: We did, Sir.

17 COMMISSIONER: - let me just tell you
 18 that on what is heard so far I don't think that you have
 19 actually cooperated with the Commission. I'll tell you
 20 that now so you can answer it because I might well find
 21 that and say that in due course. Now here's your
 22 opportunity to tell us why I should not find that you have
 23 not cooperated with the Commission. Do you want to say
 24 anything before we make any decision on that?

25 MR MIN: Yes, Sir. So the first point

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1 I'd like to make, Sir, is with respect to my appearance
 2 here today. I was served with a subpoena on a Saturday
 3 morning and it was under my understanding as a United
 4 States citizen, residing in the United States, given 72
 5 hours' notice to appear in South Africa, I could've elected
 6 to not have complied with that and it would've been very
 7 difficult for the Commission to have legally enforced it
 8 against me. Notwithstanding that, I made the decision to
 9 immediately hop on a plane to fly back to South Africa,
 10 it's my fourth visit here in two months, to appear
 11 voluntarily before the Commission. So in terms of
 12 cooperation and willingness to cooperate with the
 13 Commission I would respectfully ask that the Commission
 14 take that into account.

15 With respect to the documents I wanted to the
 16 give the Commission a sense, obviously you've received the
 17 end product which is the documents we have produced but I
 18 wanted to give the Commission a sense of the efforts that
 19 we have gone through to collect that information in a
 20 relatively short period of time. When we received the
 21 request for documents and they are fairly broad in terms of
 22 the scope of the requests we assembled a team from Baker
 23 McKenzie, our law firm, that have been working around the
 24 clock as has the Commission. Mr Massone provided us with
 25 over 600 documents directly which we then reviewed in terms

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1 of the scope of the specific request and narrowed that down
 2 to approximately 277 documents. We did our own independent
 3 search within Bain and Company and recognised, Sir, that
 4 we're dealing with events that took place 4, possibly 5
 5 years ago. We are dealing with people that many of whom
 6 are no longer employees of Bain and Company. So we had to
 7 do a significant amount of work to reconstruct as best we
 8 could and as accurately as we could the information that
 9 the Commission had requested. So we had to review
 10 calendars, we had to review expense reports, we had to
 11 review travel logs and a lot of this was just cross-
 12 referencing and collating the information to make sure that
 13 it was as accurate as possible. When we did our
 14 independent review of information we initially surfaced
 15 over 7 000 documents that were potentially relevant to the
 16 scope of the inquiry and by narrowing the search terms we
 17 got that down to 5 300 documents and then finally to 656
 18 documents that together with the 277 documents that Mr
 19 Massone produced we then delivered it to the Commission
 20 this past Friday.

21 I know that the applicant, the Commission had
 22 requested that we provide both hard copies and electronic
 23 copies which we did. My understanding is that the hard
 24 copies that we delivered to the Commission filled up 23
 25 lever arch file folders and the soft copies that we

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1 provided to you took up 2.2 gigabytes of data on the USB
 2 flash drive. So in terms of the volume and the effort that
 3 we have to had to undergo, Sir, I just want to make sure
 4 that the Commission understands the effort that we have
 5 been taking to cooperate and that that, what we have
 6 delivered to you on Friday and we made a concerted effort
 7 to comply with your timetable, Sir. That was the, what we
 8 delivered to you on Friday.

9 COMMISSIONER: Yes, thank you. Of course
 10 Bain and Company was also concerned about its own
 11 reputation.

12 MR MIN: Yes, Sir.

13 COMMISSIONER: That it did its own
 14 inquiry for its own reputation as well.

15 MR MIN: We are doing it, not just for
 16 our reputation, Sir, but we have an independent interest in
 17 determining what happened here. But our priority has been
 18 to respond to the requests of the Commission.

19 COMMISSIONER: Okay. Now just going to
 20 those 23 lever arch files, I had asked for all your
 21 documents that, all your documents prior to the award of
 22 the contract to Bain in this case. Correct?

23 MR MIN: Yes, Sir.

24 COMMISSIONER: What we got is 23 lever
 25 arch files of everything that you had relating to this

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1 contract, before and after, in no particular order through
 2 which we had to search in order to find those that were
 3 relevant to our request which was the documents before the
 4 contract. Are you aware of that?

5 MR MIN: I – yes, Sir.

6 COMMISSIONER: Now – thank you. Now the
 7 difficulty we're faced with now and perhaps you can help us
 8 with this, is who do we talk to about those documents?
 9 Because you'll recall I had said our methodology is
 10 documents and a person to talk about documents. Now who
 11 are we left to talk with? For example believe it or not
 12 all 23 volumes have been gone through and we have extracted
 13 some. These are not all of them but here's one of them for
 14 example and all I just want to say is who do I speak to
 15 about this? This is an email addressed to, from Vittorio,
 16 Mr Massone to, addressed to Guys. "Just had a call and
 17 heard that the SARS announcement should happen tomorrow or
 18 Monday. Meeting later in the office to discuss also a
 19 procurement process. Fabrice, Stephanie, how many teams
 20 did we say? Can we please think over about managers with
 21 and without Galatia, Galactica? I guess we should have a
 22 few weeks to ramp up procurement process but we'll need to
 23 have a first contingent to start working as soon as
 24 possible". From Stephanie to Vittorio "that's great news.
 25 The last thinking was to start with one team M plus 4 plus

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1 6 for three months to do fundamentally two things. Two,
 2 assist Tom in starting properly his new role, direct CEO
 3 support work. We will then be able based on the
 4 operational strategic assessment to build up the platform
 5 for a broader SARS transformational programme. 6 to 12
 6 months plan. Let's discuss team face to face later". Who
 7 should I speak to, to understand this, what was going on
 8 when this email was written? I can't speak to Vittorio,
 9 he's in Italy. Who is Steven, Stephanie?

10 MR MIN: I believe that is Stefan Tepano
 11 who submitted an affidavit to the Commission, Sir.

12 COMMISSIONER: And when is he?

13 MR MIN: He is in Nigeria.

14 COMMISSIONER: Nigeria. And so Vittorio
 15 and Guys, well I suppose it's all of them and then Mr John
 16 Beaumont?

17 MR MIN: He is no longer with Bain and
 18 Company.

19 COMMISSIONER: Mr Franson?

20 MR MIN: He is a partner at Bain and
 21 Company.

22 COMMISSIONER: Where?

23 MR MIN: Here in Johannesburg.

24 COMMISSIONER: This is CCd to him. Was
 25 he involved in this contract?

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1 MR MIN: Yes, Sir.
 2 COMMISSIONER: Because I see he's only
 3 CCd.
 4 MR MIN: Yes and he submitted an
 5 affidavit as well to the Commission.
 6 COMMISSIONER: Yes, okay. Fabrice,
 7 that's Fabrice Franson.
 8 MR MIN: Yes, Sir.
 9 COMMISSIONER: And there's Stephanie -
 10 MR MIN: Stefan Tepano.
 11 COMMISSIONER: - Stefan.
 12 MR MIN: Yes.
 13 COMMISSIONER: So it's Mr Fabrice Franson
 14 that we'd have to speak to who would be able to tell us
 15 about this email.
 16 MR MIN: He would have knowledge in
 17 addition to Mr Massone.
 18 COMMISSIONER: Now is there anyone else
 19 we should speak to about this email? Can you think of
 20 anyone?
 21 MR MIN: Sir, I have no – I was not
 22 involved with that process at the time. I can't -
 23 COMMISSIONER: Okay.
 24 MR MIN: - really comment.
 25 COMMISSIONER: Who's – and there's

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1 another one here which I think that you should read this by
 2 the way before we go any further. I'm going to give it to
 3 you. You can look at this and you can decide what you want
 4 to do with it and how you think we should handle it and
 5 you'll come back and tell us. But it's addressed from
 6 James Cartwright, who is James Cartwright?
 7 MR MIN: James -
 8 COMMISSIONER: Cartwright.
 9 MR MIN: I'm – that's not a name familiar
 10 to me, I'm sorry.
 11 COMMISSIONER: And Alexis, he's also not
 12 willing to cooperate, he's no longer with Bain, is that -
 13 MR MIN: He is no longer with Bain. We
 14 did contact him and ask him if he was willing to submit an
 15 affidavit and apparently he's decided not to.
 16 COMMISSIONER: And Chris Cameron? Do you
 17 know him?
 18 MR MIN: That's not ringing a bell for
 19 me, Sir.
 20 COMMISSIONER: Okay. Now as I say, this
 21 email I'm going to give to you afterwards and I suggest you
 22 read it very carefully, together with your counsel and
 23 perhaps we can talk about it at another time.
 24 MR MIN: Thank you.
 25 COMMISSIONER: Now you've heard me ask

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1 what are we going to do with this affidavit. Now Ms
 2 Steinberg has it and I think that the contents of this
 3 affidavit, the factual contents, I mean know there's a lot
 4 of commentary by you on it and how this all went about, but
 5 you weren't involved in this contract at all, were you?
 6 MR MIN: In the underlying contract?
 7 COMMISSIONER: Yes -
 8 MR MIN: No, Sir.
 9 COMMISSIONER: In the contract with SARS?
 10 MR MIN: No, Sir.
 11 COMMISSIONER: You had no knowledge about
 12 it -
 13 MR MIN: No personal knowledge, yes, Sir.
 14 COMMISSIONER: - other than perhaps there
 15 was a contract.
 16 MR MIN: No, Sir.
 17 COMMISSIONER: So I'm not really
 18 interested in your commentary on what all these things mean
 19 because you weren't there, you don't know what they were
 20 saying -
 21 MR MIN: That's correct, Sir.
 22 COMMISSIONER: - and so we'll just thank
 23 you. Thank you very much, Mr Min, and by the way, when I
 24 subpoenaed you I had no idea whether you were here or not
 25 here. I appreciate you coming all the way from America but

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1 I'm sure it's not only in our interest, it's also in Bain's
 2 interest.
 3 MR MIN: Absolutely, Sir.
 4 COMMISSIONER: That's why we subpoenaed
 5 as well Ms Moodley because in case you weren't here someone
 6 had to tell us these things.
 7 MR MIN: I understand.
 8 COMMISSIONER: And Ms Moodley, I am very
 9 sorry if you went through any stress as a result but you
 10 will see we don't actually need your testimony. So thank
 11 you very much.
 12 [10:09] And as I say I didn't know you were in America
 13 already.
 14 MR MIN: It is not a problem, Sir.
 15 COMMISSIONER: But have a good trip home.
 16 MR MIN: Thank you very much.
 17 COMMISSIONER: Shall we break for a
 18 minute and just collect yourself? Thank you, Mr Min.
 19 [INQUIRY ADJOURNS INQUIRY RESUMES]
 20 [10:39] COMMISSIONER: Some of that is
 21 attributable to what is going on at SARS. People who have
 22 heard the evidence here should be concerned. We're
 23 concerned at what's happening in SARS. This is an
 24 important inquiry and it should be done as far as we are
 25 concerned quickly and got over with and so that we know

<p style="text-align: right;">Page 2179</p> <p>1 what to do with SARS now because any losses there are being 2 suffered every day and if your taxes go up because the 3 losses are being suffered well, then you mustn't complain. 4 We don't want to have a Commission that your children 5 attend in order to hear a history of what happened to SARS. 6 We want to try and look at what is happening to SARS now. 7 That's why we should take this seriously. Every citizen of 8 South Africa should be taking this very seriously because 9 it belongs to them, this organisation. 10 MS STEINBERG: We have an affidavit from 11 Mr Massone which is dated 17 September 2018 and it is in 12 answer to the four questions that you referred to earlier 13 that you sent in in your letter. The – there are really 14 two main parts in this affidavit. The first part concerns 15 Mr Massone's meetings with Mr Moyane and the second part 16 concerns Mr Massone's meetings with then President Zuma and 17 I'll go through it in that order. 18 Mr Massone discusses how he was introduced to Mr 19 Moyane and who introduced him. I don't think that's 20 particularly relevant. He speaks about a number of 21 meetings in this context. He says that he was told that 22 Moyane had the ambition to become the next commissioner of 23 SARS which position had recently become vacant following 24 the resignation of Oupa Magashula in July 2013 and the 25 purpose of the introduction to Bain was for Bain to advise</p>	<p style="text-align: right;">Page 2181</p> <p>1 as the name suggests an outside-in document is a due 2 diligence to better understand an organisation. It is 3 prepared using reliable publicly available information and 4 I would like to show the Commission a couple of the slides 5 that form part of that presentation. 6 COMMISSIONER: Yes. Do you know how to 7 work that? 8 MS STEINBERG: I am hoping so. What I'd 9 like to point out here, Judge, is that as early as 13th of 10 October – 11 COMMISSIONER: 2013? 12 MS STEINBERG: 2013, Bain has 13 recommended, if you look at the last bullet point, the 14 third bullet point that there must be a profound strategy 15 refresh. So it seems that before Bain ever set foot into 16 SARS the plan was a profound strategy refresh, nothing on 17 the edges. 18 COMMISSIONER: What, in order to 19 transform SARS? 20 MS STEINBERG: And that, you'll see that 21 theme pops up throughout the slides. Now this is a slide 22 representing the SARS organisational model as it was at 23 that time and we see that from the title of the slide is 24 that Bain's assessment is that the organisation is too 25 concentrated and presents many duplication and</p>
<p style="text-align: right;">Page 2180</p> <p>1 Moyane on how to achieve his professional goals. Mr 2 Massone says, "my meetings with Moyane are to be understood 3 in the context of how Bain and I operate regarding the 4 development of chief executive office in the private 5 sector." 6 It is an ordinary part of our global business to 7 meet with corporate executives who are in need of support 8 and assistance in reaching their own personal development 9 objectives as high-performing leaders, managers and 10 business executives. We assist these individuals in 11 identifying future opportunities to advance their own 12 careers and in realising these opportunities. 13 In line with the usual Bain strategy to build 14 trust and credibility when meeting a senior decision-maker 15 I prepared fully in advance of that initial meeting in 16 order to make a strong first impression. At the time my 17 intention was to use our increased visibility arising from 18 the Telkom success story to raise our overall profile. And 19 then he says for this reason he asked Mr Stefan Tepano to 20 prepare what is called an outside-in perspective or point 21 of view on SARS in order that we might present it at my 22 first meeting with Moyane." 23 He then says, "the first meeting took place on 24 Sunday the 13th of October 2013 and he presented this 25 outside-in document which is entitled SARS 2.0." He says</p>	<p style="text-align: right;">Page 2182</p> <p>1 inconsistencies and if you look on the left-hand side, the 2 two boxes in blue, there's a particular focus on the chief 3 operating officer playing a critical role into SARS 4 organisation and below that, that the chief operating 5 officer covers a wide range of activities directly 6 responsible for delivery. 7 PROF KATZ: Sorry, could I just ask what 8 is the date of these two slides? 9 COMMISSIONER: 2013. 10 MS STEINBERG: October 2013. 11 COMMISSIONER: These slides are VM4 are 12 they? 13 MS STEINBERG: Yes. 14 COMMISSIONER: Okay. 15 PROF KATZ: Okay. 16 MS STEINBERG: They are later used as 17 part of a later presentation but that's their first time, 18 their first use as far as I can tell. 19 COMMISSIONER: Yes. Yes. 20 MS STEINBERG: This then is the proposed 21 new vision and agenda for SARS and, Judge, then a new 22 transformation agenda. So that was clearly the plan. And 23 just note the Phoenix eco-system, the third block from the 24 bottom because we'll get to that. 25 MR KAHLA: Just for my own clarity.</p>

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1 MS STEINBERG: Yes.

2 MR KAHLA: Could you please maybe just

3 help me just recall when did Commissioner Magashula step

4 down. Was it prior to 2013?

5 MS STEINBERG: I think it was in 2013 but

6 I stand to be corrected. He had already stepped down by

7 this point in time.

8 MR KAHLA: So when the outside-in review

9 was done it was after he had stepped down?

10 MS STEINBERG: Correct. So it was after

11 he had stepped down and we are told that at that point Mr

12 Moyane had ambitions to become the commissioner of SARS and

13 this was prepared for that purpose, to coach him, to help

14 him realise those ambitions because the job was vacant.

15 MR KAHLA: Okay.

16 COMMISSIONER: Well, I'm not sure – well,

17 anyway. You see the type of question I have, as I

18 mentioned to Mr Min is, how is a plan to transform SARS,

19 but what's that got to do with your ambitions to become the

20 commissioner of SARS. Anyway, that's what he says.

21 MS STEINBERG: Well, Judge, it would seem

22 –

23 COMMISSIONER: Anyway, yes -

24 MS STEINBERG: It would seem from what we

25 have that what executive coaching means in this context is

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1 a plan to radically refresh and transform SARS. This slide

2 I've included because I think another important theme, the

3 second bullet point on the left, attract and retain top

4 management team, seems to me there's an assumption there

5 that one, that there isn't a top management team. One is

6 going to have to attract one. There's a slide missing.

7 MR KAHLA: Are we going to get anyone to

8 clear up all of the assumptions that you're pointing out on

9 the side of Bain?

10 MS STEINBERG: Well, if somebody comes to

11 testify who has the requisite knowledge, that would help.

12 There is a slide which I'm going to ask our technical

13 support to find but it's not crucial if they don't. It's a

14 slide entitled SARS point of departure and it says in the

15 decades – it's talking about the modernisation program, the

16 decades spent building up the modernisation program. It

17 says in the decades SARS modernisation program has

18 delivered results and it notes the efficacy of the

19 modernisation program, the relevant increase of individual

20 and corporate taxpayers, successful adoption of e-filing to

21 facilitate collection process. It says over 90% in South

22 Africa and it managed to run operations within the

23 allocated government budget. So there is an

24 acknowledgement here of the success of that modernisation

25 program.

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1 Judge, to go back to the affidavit, Mr Massone

2 then speaks a little bit more about this concept of CEO

3 coaching and again he says it's what Bain does in the

4 private sector and they focus in particular on the

5 executive's first 100 days in office and they do this so

6 often that they actually have standardised intellectual

7 property that their consultants can access when creating

8 the type of presentation that they created for Mr Moyane

9 and he then attaches to his affidavit, that's VM5, the

10 slides looking at the first 100 days and I've pulled out a

11 few.

12 MR KAHLA: This is part of VM5, what we

13 have now?

14 MS STEINBERG: Yes.

15 COMMISSIONER: Well –

16 MS STEINBERG: But –

17 COMMISSIONER: Just a minute.

18 MS STEINBERG: It's also important –

19 COMMISSIONER: Here he's talking about –

20 he's saying look, this is what we normally do and VM5

21 sounds to me as if it's looking at the template they have.

22 Can we go to what they actually produce –

23 MS STEINBERG: No, this was produced,

24 Judge. It was shown to Mr Moyane and then it was part of –

25 COMMISSIONER: When was it shown to him?

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1 Because on Sunday they gave him the SARS 2.0 document and

2 if you look at -

3 MS STEINBERG: Sorry, this is VM6.

4 COMMISSIONER: It is VM6 that was at the

5 meeting –

6 MS STEINBERG: It is VM6 –

7 COMMISSIONER: Sorry. There was first a

8 meeting on – then there was a meeting on the 24th, 5th of

9 February.

10 MS STEINBERG: Yes.

11 COMMISSIONER: Where they met at the

12 presidential residence in Cape Town.

13 MS STEINBERG: Correct.

14 COMMISSIONER: He was there to see Zuma,

15 not Moyane but Moyane was also there and –

16 MS STEINBERG: Correct.

17 COMMISSIONER: They were in the waiting

18 room together.

19 MS STEINBERG: Then there's a meeting on

20 the 15th of May 2014.

21 COMMISSIONER: Yes.

22 MS STEINBERG: Which he describes as a

23 catch-up lunch with Mr Moyane. Then there's a meeting on

24 the Monday the 2nd of June and that's the meeting at Bain

25 offices where the first 100 days document that they had

<p style="text-align: right;">Page 2187</p> <p>1 prepared was presented and these slides –</p> <p>2 COMMISSIONER: That's VM6?</p> <p>3 MS STEINBERG: Correct.</p> <p>4 COMMISSIONER: And are we going to see</p> <p>5 that one?</p> <p>6 MS STEINBERG: Yes. So this is the first</p> <p>7 slide that I've pulled out from that and again we have the</p> <p>8 attract and retain the top management team and here you</p> <p>9 have the framework and key actions for the first 100 days.</p> <p>10 The left-hand column, the third bullet point is to launch</p> <p>11 an IT diagnostic which we now know was done through Gartner</p> <p>12 and in fact the IT program was stopped. Now the last</p> <p>13 bullet point there, testing BH and assessing performance of</p> <p>14 different components of COO perimeter. Now you will recall</p> <p>15 that earlier we saw a slide that said there's an over-</p> <p>16 concentration with regard to the COO. One can only assume</p> <p>17 that BH stands for Barry Hore who was then the COO at the</p> <p>18 time.</p> <p>19 The new slide is build a healthy sponsorship</p> <p>20 spine to accelerate change and identify individuals to</p> <p>21 neutralise. Now we have a – one of the letters from Mr Min</p> <p>22 attempt to explain the term neutralise and I'd like to read</p> <p>23 what he –</p> <p>24 COMMISSIONER: I asked him, those</p> <p>25 commentaries are his, you know, that's his view from</p>	<p style="text-align: right;">Page 2189</p> <p>1 neutralise individuals means to identify and convert</p> <p>2 detractors into promoters or in other words to focus on</p> <p>3 improving the satisfaction levels of currently disgruntled</p> <p>4 employees.</p> <p>5 COMMISSIONER: He doesn't describe what</p> <p>6 is meant by building a healthy sponsorship spine which I</p> <p>7 understand to be the blue line.</p> <p>8 MS STEINBERG: Yes. Judge,</p> <p>9 notwithstanding Mr Min's explanation we do know that what</p> <p>10 happened is that within the first few weeks of Mr Moyane</p> <p>11 arriving at SARS he suspended his executive and by the end</p> <p>12 of the year there were already some resignations. Now</p> <p>13 significantly, given the focus on the COO, Mr Hore and the</p> <p>14 fact that he was seen to be powerful within the</p> <p>15 organisation, I want to draw the Commission's attention to</p> <p>16 one of the email chains that we found in the 23 lever arch</p> <p>17 files.</p> <p>18 COMMISSIONER: Just while we are on that</p> <p>19 diagram, I can't really understand it. You've got the blue</p> <p>20 line down the middle which is the spine.</p> <p>21 MS STEINBERG: Yes.</p> <p>22 COMMISSIONER: Then you have got yellows,</p> <p>23 watch out.</p> <p>24 MS STEINBERG: Yes.</p> <p>25 COMMISSIONER: Now who do we watch out</p>
<p style="text-align: right;">Page 2188</p> <p>1 Boston. He wasn't involved in this at all, so I'm not sure</p> <p>2 how helpful that is. I thought he acknowledged that.</p> <p>3 MS STEINBERG: So would you rather I</p> <p>4 didn't read that?</p> <p>5 COMMISSIONER: Well, it's in the</p> <p>6 affidavit for what it's worth. I mean we can read it but I</p> <p>7 can't see how it helps but tell us.</p> <p>8 MR KAHLA: But aren't you suggesting that</p> <p>9 Mr Min might explain what neutralise means in this context</p> <p>10 in relation to the nomenclature used within Bain?</p> <p>11 MS STEINBERG: Yes. He does so in his</p> <p>12 letter to the judge on 9 September 2018. He says the</p> <p>13 reference in the title of the slides to identify</p> <p>14 individuals to neutralise could be misconstrued as a plan</p> <p>15 to eliminate certain positions or terminate the employment</p> <p>16 of certain individuals especially in the context of the</p> <p>17 personnel disruptions which subsequently occurred at SARS</p> <p>18 however it is in fact a reference to something entirely</p> <p>19 different.</p> <p>20 Bain has a proprietary product called net</p> <p>21 promoter system which is used to measure consumer or</p> <p>22 employee satisfaction. In the context of employees,</p> <p>23 individuals are classified as either being promoters,</p> <p>24 passive or detractors depending on their level of</p> <p>25 satisfaction with their employer. The reference to</p>	<p style="text-align: right;">Page 2190</p> <p>1 for? What does the yellow person there?</p> <p>2 MS STEINBERG: I –</p> <p>3 COMMISSIONER: And then external</p> <p>4 influence? And then others. I am a bit colour blind so I</p> <p>5 don't know what colours those are but to neutralise and</p> <p>6 there's a – I don't know what colour it is.</p> <p>7 MS STEINBERG: So I would imagine –</p> <p>8 COMMISSIONER: Who are they neutralising</p> <p>9 there?</p> <p>10 MS STEINBERG: I would imagine the spine</p> <p>11 is the promoters and the people to watch out for are the</p> <p>12 detractors, but I'm just surmising.</p> <p>13 [10:59] MR KAHLA: Advocate Steinberg, my</p> <p>14 difficulty with this presentation in the absence of anybody</p> <p>15 testifying on it and what it's import, the import of all of</p> <p>16 this terms is that I'm just left in simply getting a sense</p> <p>17 of what your speculation could be and I don't know whether</p> <p>18 it's going help to get someone to speak on these slides and</p> <p>19 explain these slides to us.</p> <p>20 COMMISSIONER: Well you know I just want</p> <p>21 to respond to that. That's exactly what my problem was</p> <p>22 when I spoke to Mr Min. Tell us who to speak to about this</p> <p>23 now, Massone is not coming. I mean we can't go around</p> <p>24 trying to search for people in Bain now to come and explain</p> <p>25 what Bain wants to put before us. So anyway that's the</p>

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1 problem. Mr Min, you're still here, do you understand the
2 problem?

3 MR MIN: I do Sir.

4 COMMISSIONER: And you can understand the
5 problem that we might, we might draw our own inferences
6 from these facts without knowing what Bain has to say.

7 MR MIN: I do, Sir.

8 MS STEINBERG: Now the email that we
9 found in files that Bain gave us on the 3rd of December 2014
10 there's an email from Fabrice Franson to Mr Massone and it
11 forwards him the media alert of Mr Barry Hore's resignation
12 and he writes, good bye Barry Hore dot, dot, dot. Now
13 Massone responds saying now I'm scared by Tom, this guy was
14 supposed to be untouchable and took Tom just a few weeks to
15 make him resign, scary and Franson says I agree. Now the
16 reason I read that out is it -

17 COMMISSIONER: Sorry where does that
18 email come from?

19 MS STEINBERG: From the 23 files.

20 COMMISSIONER: The volumes?

21 MS STEINBERG: Yes. Now this email
22 suggests that the more innocuous reading of neutralise is
23 not in fact the correct one. There seem to have been right
24 from the word go an identification of a concentration of
25 power in the COO's job and an attempt to neutralise in the

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1 sense to get rid of him and that's precisely what happened
2 and these emails are fairly celebratory in their tone.
3 It's the fact you know responding to the fact that Mr Hore
4 had resigned. This was the slide I had.

5 COMMISSIONER: I think just show us the
6 slides and let's not have an argument yet and then in due
7 course I'm going to ask you, counsel at the end of this to
8 present to us what they say we should find and perhaps one
9 should leave this until then. Let's just see what the
10 slide show for the moment. If that's okay. .

11 MS STEINBERG: I'll merely draw your
12 attention to why I selected the slide.

13 COMMISSIONER: I understand.

14 MS STEINBERG: This was the slide which
15 was acknowledging the success of the modernisation
16 programme and I put that next to the slide which then
17 suggested one must look critically at the person and the
18 job that achieved this.

19 COMMISSIONER: Yes. No I understand.

20 MS STEINBERG: And then this is just
21 again to show, this is before Mr Moyane had taken office
22 that there was already a potential new structure that has
23 been created for SARS. Which is very -

24 PROF KATZ: Without examination.

25 MS STEINBERG: This is outside-in, there

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1 had been no, Bain and Mr Moyane had not yet set foot into
2 SARS and there was already a new model and that's, those
3 are the slides.

4 COMMISSIONER: So that's the first 100
5 days document, that was Monday the 2nd of June?

6 MS STEINBERG: Yes.

7 COMMISSIONER: And then again on the 16th
8 of June. They're not sure, it's in his diary but not sure
9 whether it had occurred.

10 MS STEINBERG: Then the potential SARS
11 organisation chart and focus areas is what I've just shown
12 you and that was shown at a meeting at Bain's office on the
13 26th of June 2014. That's the new organisational structure.

14 COMMISSIONER: Yes.

15 MS STEINBERG: Then there's, on the 6th of
16 August 2014 Bain had some sort of breakfast and Mr Moyane
17 was there but that was a general meeting. Then Thursday
18 the 28th of August 2014 there was a meeting at Bain's
19 offices and in addition to Moyane and others Mr Makwakwa
20 attended that meeting and Mr Massone says, "what I recall
21 is Makwakwa sharing his personal issues that he had been
22 experiencing at SARS at that time." The next -

23 MR KAHLA: Who is Mr Ndlovu? The Mr
24 Ndlovu there.

25 MS STEINBERG: I didn't think it was

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1 necessary to bring third parties into this, if you don't
2 mind, Mr Kahla, I think there's no reason to name -

3 MR KAHLA: No I'm just really basically,
4 because there's a mention around Mr Makwakwa, I'm trying to
5 figure is Mr Ndlovu also a SARS employee?

6 MS STEINBERG: No, no he was a third
7 party who made the introductions.

8 MR KAHLA: Okay.

9 MS STEINBERG: Ja. Judge, you know there
10 are then references to further slide presentations. They
11 are merely versions of what we've already seen. So I'm not
12 going to dwell on them.

13 COMMISSIONER: Were there former, were
14 there further meetings?

15 MS STEINBERG: No.

16 COMMISSIONER: So there were one, two,
17 three, four, five, sorry I thought there were, ja, one,
18 two, three, four, five, six, seven, I thought there were
19 eight but anyway. Well one we're not sure if it occurred.

20 MS STEINBERG: Ja.

21 COMMISSIONER: That's in the diary but
22 we're not sure if -

23 MS STEINBERG: That's right ja.

24 COMMISSIONER: So there's six. Okay.

25 MS STEINBERG: The balance of the

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1 affidavit deals with the meetings with former President
 2 Jacob Zuma.
 3 COMMISSIONER: Do we need to go through
 4 that, I don't think so myself. Zuma's meeting.
 5 MR KAHLA: Do these meetings have any
 6 relevance to the SARS, were they relating to any matter
 7 concerning SARS?
 8 MS STEINBERG: The only indirect
 9 relevance that I can see is that Bain presented various
 10 projects to then President Zuma. One of them is this
 11 project Phoenix which then makes an appearance in the
 12 slides for SARS. Project Phoenix is described as a
 13 national and regional IT champion. It's creating an IT
 14 network involving Telkom which Bain then had seen as
 15 somehow fitting into SARS's programme. Otherwise I can see
 16 no relevance to SARS and Mr Massone says that he never
 17 discussed SARS or Moyane with Mr Zuma.
 18 COMMISSIONER: Well do you have the full,
 19 all the annexure to this affidavit with you?
 20 MS STEINBERG: With me today, no. I
 21 don't.
 22 COMMISSIONER: Are they somewhere?
 23 MS STEINBERG: They are in our offices,
 24 Judge.
 25 COMMISSIONER: There's some emails there

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1 I think that one should look at as well. Anyway, ja.
 2 MS STEINBERG: Judge, Mr Massone says
 3 that he had -
 4 COMMISSIONER: Just on that, because the,
 5 it was on the question that was asked here that if I recall
 6 there's an email there that indicates that this contract
 7 with SARS was going to ride on the back of the Telkom
 8 contract?
 9 MS STEINBERG: Yes.
 10 COMMISSIONER: Piggyback its way through
 11 without going -
 12 MS STEINBERG: Yes.
 13 COMMISSIONER: Through a procurement
 14 process.
 15 MS STEINBERG: Yes.
 16 COMMISSIONER: There's an email that says
 17 Mr Makwakwa phoned them I think and said, I may be wrong,
 18 Mr Makwakwa phoned him at some time and said you know get
 19 something from Telkom to set up with this piggyback thing.
 20 MS STEINBERG: Yes, I think your
 21 recollection is correct, Judge.
 22 COMMISSIONER: So that's the relevance of
 23 Telkom to this is that there's a contract at Telkom.
 24 MS STEINBERG: Yes.
 25 COMMISSIONER: And you're going to try to

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1 piggyback on that, your way through onto the, onto this.
 2 MS STEINBERG: Yes, in fact paragraph 62
 3 of the affidavit on page 19 speaks to that.
 4 COMMISSIONER: Where's it? Oh. Final
 5 question is the question posed by Mr Kahla as to whether I
 6 had met with, no.
 7 MS STEINBERG: No.
 8 COMMISSIONER: I've also -
 9 MS STEINBERG: The paragraph starting the
 10 next question relates to whether Moyane approached me about
 11 the possibility of approaching Telkom. Paragraph 62,
 12 Judge.
 13 COMMISSIONER: Yes.
 14 MS STEINBERG: In respect of the
 15 transversal contract and Mr Massone says during his
 16 testimony he answered no it's the first time I've heard of
 17 that but that he reviewed his records and he confirms that
 18 he did receive a phone call from the then acting chief
 19 operating officer of SARS who was Mr Makwakwa about which
 20 he had forgotten and he attaches that email.
 21 COMMISSIONER: I discovered
 22 correspondence confirming the score, that's what I was
 23 looking at and this appears to indicate that I did receive
 24 a request as to whether SARS could use the Telkom contract
 25 to, as it were, they called it transversal contract.

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1 Transversal in which you piggyback on the one to go through
 2 to the next one.
 3 MS STEINBERG: Finally, Judge, the last
 4 part of the affidavit which is from page 21, paragraph 69
 5 onwards.
 6 COMMISSIONER: Sorry page?
 7 PROF KATZ: 21.
 8 COMMISSIONER: 21, ja.
 9 MS STEINBERG: Deals with the RFP process
 10 and at paragraph 70 Mr Massone says before and leading up
 11 to 11 December 2014 I did not have insight, that's into the
 12 RFP process beyond the following. The meetings with Moyane
 13 on the topics of SARS and email received from Mogogodi
 14 Deyorke executive procurement SARS on 2 December requesting
 15 any current public entity relationships and references that
 16 I might have had and the telephone call from the then chief
 17 operating officer of SARS regarding the request of whether
 18 SARS could use the Telkom contract. Judge, there's
 19 questions that emerge out of the contact between SARS and
 20 Bain before the advertisement of the RFP, that need to be
 21 answered.
 22 COMMISSIONER: Is that it? Mr Min,
 23 sorry, okay.
 24 MR KAHLA: My question was really just
 25 to, if you could help me understand again, just remind me

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1 when were invitations for the role of, if there were any,
2 if there was any invitation for the role of commissioner
3 put out, I'm trying to just understand the sequencing, when
4 the process to fill the vacancy was triggered.

5 MS STEINBERG: Mr Kahla, I don't know as
6 a matter of fact, what I know is that in August 2014 we see
7 an email from Bain, that the Judge read out, saying the
8 announcement is about to be made. So I assume it's around
9 that time. But I don't know as a question of fact at this
10 stage.

11 COMMISSIONER: Well I think the question
12 related to when were invitations put out, I'm not sure
13 there was any process for the appointment of the
14 commissioner, it was just a presidential appointment, as I
15 understand it but we can check on that.

16 MS STEINBERG: No we do know that there
17 were over a hundred applicants but we can find that
18 information.

19 MR KAHLA: And when did he take office?

20 MS STEINBERG: Late September -

21 MR KAHLA: 2014?

22 MS STEINBERG: 2014.

23 COMMISSIONER: 27 September 14.

24 PROF KATZ: May I just ask one question.
25 Counsel, my recollection when Mr Massone gave evidence last

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1 time is that he had received a call to meet with Mr Moyane
2 who was then commissioner of prisons.

3 COMMISSIONER: No, no he wasn't -

4 MS STEINBERG: No, he had left, he was at
5 SETA.

6 COMMISSIONER: SETA.

7 PROF KATZ: Oh ja, and the question was
8 did you know what he called you for. My recollection was
9 no. If that's the case all he's giving the inside outside
10 and that with detail knowledge was prepared for that
11 meeting. Can we just check and you'll recall that the -

12 COMMISSIONER: Well I, you know I don't
13 know and that's the problem that Bain leaves us in. I mean
14 they throw us this affidavit and walk away and then say
15 look you interpret it as you wish. It seems. But Mr Min,
16 do you understand the problem?

17 MR MIN: Yes.

18 COMMISSIONER: Do you understand that
19 there's a problem for Bain as well, apart from holding us
20 up and there's a lot of questions arise in relation to this
21 affidavit. You can see that already.

22 MR MIN: Yes, Sir.

23 COMMISSIONER: And these emails and so
24 forth. Now if you can't produce anyone you can't. But I
25 really just want you to be well aware that there are many

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1 questions that arise here that Mr Massone would have been
2 asked and I, you haven't got him now and I understand your
3 position. But if you know, if you've got someone else at
4 Bain who can explain all these things well it's up to you.
5 You produce the person. But you know we really can't go
6 running after Bain to look after its interest as it were.
7 They must, if they want to say things they must put them
8 up.

9 MR MIN: Yes.

10 COMMISSIONER: Do you understand Mr Min?

11 MR MIN: I do, Sir.

12 COMMISSIONER: Thank you.

13 MS STEINBERG: And if I may say, Mr
14 Kahla, when we get documents without an explanation my
15 understanding of our role as advocates for the Commission
16 is that we can't ignore them. We must try and understand
17 them and interpret them and draw inferences and at this
18 stage that is all we can do which is why I've tried to put
19 them in a context for you.

20 MR KAHLA: Ja, I suppose what I've been
21 trying to get to is that has Bain been asked in the absence
22 of Mr Massone is there any other person who could come and
23 address these, for example have had a question around, you
24 know, I know you've said you don't want to get into this
25 third party. But I wanted to understand, is this third

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1 party a consultant to Bain or is this, was it just, were
2 these chance happenings where he seems to have been in all
3 of these meetings?

4 MS STEINBERG: There was somebody who had
5 a contract with Bain, precisely to do this kind of work to
6 help networking, to help facilitate networking.

7 MR KAHLA: Is this the third party that
8 you've not wanted to deal with? Was that his role, was he
9 contracted for that role?

10 MS STEINBERG: Yes.

11 MR KAHLA: Okay.

12 COMMISSIONER: Just to assist my
13 colleague. You know I found for the first time on Friday
14 that Massone was not going to be here. I received a letter
15 from Tabacks Attorneys who is then acting for Mr Massone
16 and they told me for the first time that he had gone to, he
17 was ill, he had gone to Italy and please excuse him. So
18 that was Friday afternoon, I think it was. Which is why
19 I've, Mr Min, which is why I've asked you here to, not only
20 to deal with your correspondence but to let you know that
21 he's gone and we don't know who to talk to.

22 MR MIN: I understand Sir.

23 COMMISSIONER: Is that it?

24 MS STEINBERG: That's it, Judge.

25 COMMISSIONER: And we are going to

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1 adjourn till?

2 MS STEINBERG: Till 2 o'clock.

3 COMMISSIONER: Thank you very much.

4 [INQUIRY ADJOURNS INQUIRY RESUMES]

5 [14:05] COMMISSIONER: Can I just say again

6 something I've said every time we've sat down? If there's

7 anyone who thinks any witness is not telling the truth

8 please come forward and tell us. If they think any witness

9 is, that there is another point of view and you wish to

10 express it, tell us. There has been not one witness

11 contrary to some assertions that have been made, not one

12 witness who has wanted to give evidence on a relevant

13 matter has been turned away, not one. And everyone who has

14 come here has been, come voluntarily. Three subpoenas have

15 been issued and those were for Mr Min and for Ms Moodley

16 who didn't need to give evidence and Mr Massone. Those are

17 the only subpoenas that have been issued, but not one

18 person has been turned away. Good afternoon.

19 MS STEINBERG: Judge, we have called back

20 Mr Tshitangano who is the director of Supply Chain

21 Management Compliance Monitoring at the National Treasury.

22 He had testified merely about Bain's contract and we had

23 asked him to please look into the other procurement

24 processes that took place during our terms of reference,

25 the major ones and he has come back to tell us about those.

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1 COMMISSIONER: Mr Tshitangano, thank you

2 very much for coming back again. We appreciate the time

3 and I think you put quite a lot of work into this as well,

4 thank you very much. Do you affirm the evidence you give

5 will be the truth, the whole truth and nothing but the

6 truth? If so will you say I do?

7 MR TSHITANGANO: Yes, I do.

8 COMMISSIONER: Thank you.

9 EVIDENCE OF MR TSHITANGANO

10 MS STEINBERG: Mr Tshitangano, before we

11 start with your presentation, if we could just clear up

12 after you made your submissions about Bain's contract, last

13 time contracts because there were three of them, we got an

14 email from the chief financial officer of SARS in which he

15 enclosed a letter from you dated the 8th of September 2016

16 in which there was, you approved a deviation for the third

17 Bain contract and we'd like you to put that into context to

18 explain what that deviation meant and why you gave it at

19 that time.

20 MR TSHITANGANO: Okay. Thanks. The, if

21 you remember Bain and Company was requested to submit a

22 proposal first in December 2014 as a first phase of the

23 project. Then they were appointed again for the second

24 phase which was done by SARS themselves. Then there was a

25 last phase which was a 50 million project to conclude the

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1 work that was done that in phase 1 and phase 2 which we

2 granted them approval to do because if it was not done then

3 it will have meant according to what the information have,

4 it would've meant that phase 1, phase 2 would have been

5 fruitless and wasteful expenditure if the last phase was

6 not done.

7 MS STEINBERG: But you had not granted

8 deviation for the second phase for example had you?

9 MR TSHITANGANO: No.

10 MS STEINBERG: So just to summarise. The

11 first phase was the closed tender in which Bain was

12 appointed for a contract worth approximately 3 million.

13 MR TSHITANGANO: Correct.

14 MS STEINBERG: After that was the largest

15 tender for the new operating model. That, the SARS EXCO

16 approved a deviation but Treasury never approved that

17 deviation.

18 MR TSHITANGANO: Correct.

19 MS STEINBERG: You were then asked to

20 approve a deviation for the final phase, the final 50

21 million and if I understand you correctly you're saying

22 well your hands were tied because by that stage if you

23 hadn't approved that third phase it would've rendered the

24 earlier work fruitless and wasteful.

25 MR TSHITANGANO: That's what we -

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1 MS STEINBERG: Is that correct?

2 MR TSHITANGANO: Correct, yes.

3 MS STEINBERG: Thank you. Can you tell

4 us which procurement processes you're going to discuss with

5 us this afternoon?

6 MR TSHITANGANO: Mainly it will cover

7 the, it's a number of them. We will cover one, it's

8 Gartner but it just got several contracts and Gartner will

9 be linked to Grant Thornton. It will be only two.

10 MS STEINBERG: Okay.

11 MR TSHITANGANO: Yes.

12 MS STEINBERG: Thank you, please go

13 ahead.

14 MR TSHITANGANO: I want to distribute the

15 documents. The table of content, I'll just start

16 highlighting the legislation from there I will show you

17 what is in the code of conduct of Gartner. Then this phase

18 1 findings and recommendations, there's IT review phase 1,

19 phase 2. The grab migration project, star assessment and a

20 number of them who, I'll cover them. From the legislation

21 which I'm not going to waste your time, we have section 38

22 of the Public Finance Management Act which deals with

23 accounting officers. And then you have section 51 of the

24 Public Finance Management Act which deals with public

25 entities. The contents are the same, what is important is

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1 that if you are procuring you must follow a system that is
 2 fair, equitable, transparent, competitive and cost
 3 effective. Then you'll have section 76 which allows
 4 National Treasury to issue instruction notes and circulars
 5 to instruct institutions on certain matters. Then you have
 6 section 79 which is the, a departure. In other words if a
 7 department or any institutions want to depart from any
 8 instruction or directive from the Treasury regulations they
 9 will need to apply to the Minister of Finance using section
 10 79. It will be assessed, if it's approved then you can
 11 procure without following a certain instruction note. Then
 12 you'll have sections 92 of the PFMA where if you want an
 13 exemption for a certain period the Minister of finance will
 14 exempt you but that exemption is public because it must be
 15 gazetted so that it must be known which exemption has been
 16 granted by the Minister.
 17 The procurement that I talked about previously
 18 and the one that I'm going to talk about today is covered
 19 by Treasury regulations 15 March 2005 as amended. You will
 20 see the second bullet there which is, sorry, which is
 21 regulation 16(a)6.4. It's where accounting authorities,
 22 accounting officers may deviate and procure without
 23 following competitive bidding. If you look at the way this
 24 clause is phrased, it's not specifying you deviate on which
 25 conditions. It just says where it's impractical. Then

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1 you'll have regulation 16(a)6 which is the next one. This
 2 one it's where a contract has been arranged by another
 3 government institution and then you want to participate in
 4 that contract. The first requirement is that that contract
 5 shall have been arranged by means of a competitive bidding.
 6 Then the organ of state that arranged that contract and the
 7 company must agree in writing to say a third party may
 8 participate in that. National Treasury from 2005 to 2007
 9 started realising that, or noting that most of the
 10 institutions they were abusing 16(a)6.4. They were just
 11 deviating. They will use what we call impractical and then
 12 the instruction note was issued and if you check bullet
 13 number 3 there it was showing to say now this provision
 14 it's only intended for cases of emergency where immediate
 15 action is necessary or if the goods or services required
 16 are produced or available from sole service provides, it
 17 limited 16(a)6.4 to only two. It's emergency or sole
 18 supplier. Where you have got more than one supplier then
 19 you must do a competitive bid.
 20 MS STEINBERG: May I ask you a question
 21 about regulation 16(a)6.6?
 22 MR TSHITANGANO: Yes.
 23 MS STEINBERG: Those are the so called
 24 transversal contracts, no?
 25 MR TSHITANGANO: No.

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1 MS STEINBERG: No.
 2 MR TSHITANGANO: The transversal it's
 3 regulation 16(a)6.3, it's before. Those would be the ones
 4 that will have been arranged by National Treasury and then
 5 you participate. But in this case it's a contract arranged
 6 by – let me just come to the example that we have because
 7 the first one, when it was entered into it was like the
 8 contract was arranged by SETA and then SARS wanted to
 9 participate in that tender.
 10 MS STEINBERG: Yes.
 11 MR TSHITANGANO: 16(a)6.6 is applicable
 12 in that situation. Whereas 16(a)6.3 National Treasury or a
 13 provincial Treasury will arrange a transversal contract
 14 where a number of departments or institutions will want to
 15 participate. That is the difference.
 16 MS STEINBERG: So in Bain's case, what
 17 we've heard was that Bain had an existing contract with
 18 Telkom and SARS, the first thing they did before the closed
 19 tender process, is that they asked Telkom and Bain if they
 20 could participate in that contract. Now in terms of which
 21 regulation would that be?
 22 MR TSHITANGANO: It would have been
 23 16(a)6.6.
 24 MS STEINBERG: Right.
 25 MR TSHITANGANO: Yes, but the paragraph

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1 that was quoted in that letter that you are referring to,
 2 they quoted a paragraph which doesn't exist. I remember it
 3 here.
 4 MS STEINBERG: Yes.
 5 MR TSHITANGANO: Because they were
 6 talking about paragraph 2.2 of PFMA which has got nothing
 7 to do with that 16(a)6.6.
 8 MS STEINBERG: Yes, that's part of why
 9 I'm asking because I'm also confused. It doesn't exist.
 10 MR TSHITANGANO: Correct.
 11 MS STEINBERG: My second question is does
 12 this regulation envisage when a third party comes to
 13 participate in the existing contracts, does it mean that
 14 the cost of that contract can be inflated and if so are
 15 there any parameters?
 16 MR TSHITANGANO: It's a situation that we
 17 have currently because most of the institutions that use
 18 16(a)6.6 they abuse it. On its own it says if you are
 19 going to participate in that contract you must comply with
 20 the same conditions and requirements of that tender. If
 21 the period is two years, you are not going to say because
 22 I'm starting now I'm going to have another two years. It's
 23 a two year contract, if you want to participate you are
 24 starting when the contract is only two months, two months
 25 are left to last, therefore you can only participate for

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1 two months. You're not going to say I was, because when it
 2 was entered into it was 3 years or 2 years, I will
 3 participate for 3 years depending on when. But the abuse
 4 that, we see an institution arrange they go and arrange to
 5 buy four machines, smaller ones. Another institution
 6 comes, they buy eight. The amount exceeded the original
 7 amount, the conditions and requirements are not the same.
 8 MS STEINBERG: I understand, thanks.
 9 MR TSHITANGANO: Instruction note, 8
 10 2007, 2008 it's also indicating shall it be impractical to
 11 invite competitive bids for specific procurement it brings
 12 the emergency or urgent and sole supplier but what was
 13 added in this one was that if the amounts are above a
 14 million for such deviations they must be reported to the
 15 Auditor-General and National Treasury. But when they were
 16 reported to National Treasury we used just note and it was
 17 not assisting institutions because they continued to abuse.
 18 It was only Auditor-General who will check some of them and
 19 they will declare them irregular expenditure. But
 20 unfortunately even auditor-general will not audit 100% of
 21 those transactions.
 22 Noting all this abuse of 16(a)6.4 in 2016 in
 23 April we issued an instruction note 3 of 2016/17 which was
 24 now again limiting the deviation to emergency and sole
 25 source procurement and it defines what is emergency and it

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1 says any other division, those institutions who want to
 2 deviate must first come to Treasury, we assess and then we
 3 can say okay we support the deviation, go ahead.
 4 But it was not meaning that if you come to me and
 5 you say it's 50 million I'm going to assess the
 6 reasonableness whether 50 million is reasonable. I will
 7 say the reasons that you are giving, yes, you can go ahead
 8 and procure but you must ensure that the fairness, the
 9 competitive, everything is there. Then we come to
 10 instruction note 3 of 2003. The reason why I'm bringing
 11 this instruction note here, you will see that most of the
 12 contracts that I'm going to talk about were done in
 13 contravention of this instruction note. The accounting
 14 officer, the accounting authority, if you look at the first
 15 line there, it's responsible for preparing and implementing
 16 the projects, selecting the consultant, awarding and
 17 subsequently awarding the contract. And when you do that
 18 there are key elements that must be there, the need for
 19 high quality service, the need for economy and efficiency,
 20 the need to give qualified consultants an opportunity to
 21 compete in providing the services.
 22 In other words you don't just go and select one
 23 supplier and says I'm going to use this supplier because of
 24 this, the importance of transparency in the selection
 25 process. When you read paragraph 5 or clause of that

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1 instruction note what it's important which I want to
 2 emphasise here is the consultants are requested to provide
 3 professional, objective and impartial advice and at all
 4 times hold the client's interest paramount without any
 5 consideration for future work and strictly avoiding
 6 conflicts with other assignments or their own corporate
 7 interest. When you read at your own time you will see.
 8 The same as the other paragraph which I'm not going to
 9 repeat. This slide, I've just checked Gartner's code of
 10 conduct and if you check there, integrity, do the right
 11 thing, objectivity, no limits, mind-set, see opportunities
 12 where others don't.
 13 [14:25] Never settle for the status quo and the other
 14 principles that are there bolded, ignorance of the law is
 15 not a defence, but everyone does it, it is not an
 16 acceptable excuse. Those are their code but I'll talk
 17 about them, I'm just highlighting them now so that when
 18 they implemented these contracts you'll judge for yourself
 19 whether those values were uphold or not. I'll start the
 20 presentation from the tail end before the appointment.
 21 Gartner was appointed to do phase 1. IT review and
 22 modernisation and after they've done that they issued a
 23 report which I've made a copy available to the Commission.
 24 If you look at that report it's not like it's one report.
 25 It's like there are two reports because there's a report

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1 which will start dated 10 April and when you continue
 2 you'll find that there are other dates that are dated but
 3 all of them were issued in April 2015.
 4 But what is key when that report was issued these
 5 are the issue that Gartner highlighted which are very
 6 important in the awarding of the contracts. You see
 7 governance regarding how the decisions were arrived at to
 8 proceed with a certain vendor was not good. The governance
 9 with ongoing management of some contracts was not good.
 10 The renewal of contracts was also not good. Then what were
 11 they recommending in this one, what is key which I'll talk
 12 about it later, you'll they said conduct a detailed audit
 13 of the current IT vendor contracts for compliance and they
 14 were looking at the previous modernisation, how suppliers
 15 were appointed and according to them, because these are the
 16 recommendation from Gartner, according to them because
 17 things were not done properly then there must be an
 18 investigation and the investigation then this
 19 recommendation led to the appointment of Grant Thornton in
 20 2016. Initially at an amount of 12 million and later they
 21 came to us because they wanted to add the scope and we
 22 wanted firstly to see the preliminary report which they
 23 delayed giving us the reports and we rejected that
 24 additional 50 to 60 million of further investigations which
 25 they wanted.

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1 PROF KATZ: Sorry could I ask a question,
 2 please or am I interrupting? On the issue, I'm not
 3 following one thing. You say the governance with ongoing
 4 management of some contract was not good, the governance
 5 with contract renewals is, the fact of a renewal provision
 6 in a contract bad or is the exercise of the renewal, is the
 7 fact that there's ongoing management in a contract bad or
 8 is it the exercise of the ongoing management?
 9 MR TSHITANGANO: It may be both depending
 10 on how you've -
 11 PROF KATZ: Forgive me, what are you
 12 conveying here?
 13 MR TSHITANGANO: No, no remember here
 14 it's not me. This is, I said these are the recommendations
 15 from Gartner's report. I'm only highlighting because they
 16 have impact on what I'm going to say. This is what, after
 17 they have done an IT review phase 1, they issued a report
 18 to SARS and these are the issues that they were
 19 highlighting and these are the recommendation they were
 20 making Gartner, not me. I'm just highlighting so that when
 21 we talk about their procurement and how they were executed
 22 you must be in mind that they were aware of these things.
 23 MS STEINBERG: Can I ask you something,
 24 once we stopped.
 25 MR TSHITANGANO: Yes.

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1 MS STEINBERG: Do I understand that SARS
 2 had already spent 12 million reviewing the IT procurement
 3 of the past 10 years and then they wanted to spend another
 4 50 million to see if there was misspending?
 5 MR TSHITANGANO: Not there, after they
 6 have issued this report.
 7 MS STEINBERG: Yes.
 8 MR TSHITANGANO: Gartner, this
 9 recommendation which was saying conduct a detailed audit of
 10 the current IT vendor contracts for compliance, it was
 11 referring to the previous modernisation that was done by
 12 SARS.
 13 MS STEINBERG: Yes.
 14 MR TSHITANGANO: According to this report
 15 some of the contracts were not properly awarded or they
 16 were irregularly awarded. Some of the contracts were being
 17 irregularly extended and because of this then a supplier
 18 must be appointed to investigate that previous
 19 modernisation.
 20 MS STEINBERG: I understand.
 21 MR TSHITANGANO: correct. Therefore the
 22 appointment will only have been done after Gartner has
 23 issued this report which is phase 1 report.
 24 MS STEINBERG: I understand. What I'm
 25 asking is, you mentioned then R12 million and then an

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1 approval for R50 million odd, now am I understanding that
 2 SARS wanted an approval of that amount in order to review
 3 possible irregularities in the modernisation process?
 4 MR TSHITANGANO: Correct, the 5 million
 5 was like phase 1 of the initial investigations and then
 6 they wanted to do phase 2 of that investigations which will
 7 cost between 50 and 60 million and the reason why they will
 8 come to us is because of that instruction note which, 3,
 9 which was saying in any single source or if you want to
 10 extend the contract and it exceeds 15% then you must come
 11 to Treasury.
 12 MS STEINBERG: Now do you think it's
 13 appropriate for an institution to spend a minimum of
 14 R67 million to investigate whether there's been a waste of
 15 money in the past?
 16 MR TSHITANGANO: It may be a yes and no
 17 answer depending on depending on what issues are there
 18 which we talk about it when we talk about this one. If the
 19 people were stealing money and we know we must investigate
 20 them and recover government money yes we'll spend whatever
 21 we need to spend as long as we know but otherwise not just
 22 appointing people for the sake of appointing and not
 23 recover any cent because then it becomes fruitless and
 24 wasteful expenditure. If you check the other key findings
 25 in the report, here I'll, if you check the, number 4 in

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1 this slide procurement process only allows for two
 2 deviation types, namely sole supplier and emergency.
 3 However modernisation often used impracticality due to time
 4 pressure as I said. It's their finding which was very
 5 clearly they know what 16A.6.4 says. You only have to
 6 only, you only deviate but they are saying from their
 7 investigation or from their review SARS was using a third
 8 reason which was not a valid reason because that reason was
 9 called impracticality which is not governed by any rule.
 10 Then if you look at the first one it appears to
 11 Gartner that rules were moulded to suit the end goal and
 12 objectives and then when you look at number 3 it will say
 13 it appears to Gartner that inadequate procurement planning
 14 could have created emergencies which emergencies are then
 15 used to justify deviation from procurement process. I only
 16 extracted recommendations that were related to procurement
 17 which are the findings and the recommendations by Gartner.
 18 This slide I'm showing you what the contracts that were
 19 given to us by SARS which were awarded to Gartner. There's
 20 a web based research of 3.9 million, then we'll come to the
 21 phase 1, ITC strategic development which is the 12 million,
 22 the 12.9 and then you'll have the phase 2 strategy which is
 23 144 million and then you'll have the research advisory
 24 service 5.6, you'll have the Gartner graph implementation
 25 9.7, you'll have the staff assessment 8.7, then you'll have

<p style="text-align: right;">Page 2219</p> <p>1 the research for IT 16.3. These contracts were awarded to 2 Gartner by SARS on different times which we'll come to some 3 of them. Let's start with phase 1 of the project. 4 Phase 1 of the project what I can highlight to 5 you is that Gartner was not the first choice. On the 5th 6 EOH Mthombo was the first choice. On the 5th of December 7 2014 the same day that Commissioner Moyane wrote a letter 8 to Telkom about participation in the Bain and Company. He 9 wrote another letter to SETA to participate in the EOH 10 Mthombo contract on the 5th of December. Then on the 8th of 11 December the SETA CEO Nomvalo approved the participation, 12 the letters are there in the pack that I have given you. 13 But in the slides I didn't put it. 14 MR KAHLA: Just for clarity for me. The 15 invitation to participate was it in the EOH contract, EOH 16 Mthombo with SETA. 17 MR TSHITANGANO: Yes. 18 MR KAHLA: Or was it in the Gartner with 19 SETA? 20 MR TSHITANGANO: The letter on the 5th of 21 December 2014 it's written to SETA, SARS requesting to 22 participate in a contract between SETA and EOH Mthombo, 23 that was on the 5th of December. Then on the 8th of 24 December 2014 SETA CEO approved the participation. That's 25 what Treasury regulations 16A.6.6 say. In order to</p>	<p style="text-align: right;">Page 2221</p> <p>1 conclude the contract, you'll see what is standard if you 2 are requesting a service from any supplier you'll have 3 terms of references which will have been developed and 4 approved in the institution. We requested evidence from 5 SARS who sent that terms of reference to Gartner and when, 6 whether there is an email, whether there is a letter that 7 accompanied, the sending of the terms of reference because 8 you can only prepare a proposal if you have received terms 9 of reference. We requested both SARS and Gartner they did 10 not respond to those questions. 11 Then you see a proposal and that proposal is 12 dated the 21st of January 2015. But when you read that 13 proposal it's full of errors which, if you look at my last 14 sentence there, it's like it was, because of December 15 holidays because if you, the last sentence on page 6 of the 16 project will commence on 19 January 2015 but the proposal 17 outside is that it's the 25 and it's not handwritten, it's 18 typed. Then first sentence on page 34 of that proposal the 19 proposal is valid for 30 days from 2 January 2015 then the 20 contract that was signed was dated 6 January 2015 but if 21 you check it's now amended using a pen to 6 February 2015. 22 But the contract was finally signed on 5 February 2015. If 23 you remember when I was talking about the Bain and Company, 24 there was a meeting of the BAC on the 21st of January 2015 25 and what is surprising is why was this procurement not</p>
<p style="text-align: right;">Page 2220</p> <p>1 participate SETA CEO will have approved and EOH Mthombo 2 will also approve and then, it is then that SARS and EOH 3 Mthombo will sign a contract with the similar conditions. 4 Then from the 9th of December you see email 5 correspondences, you'll remember the approval has already 6 been given by SETA, but you see email correspondences 7 between Makwakwa of SARS and Shibubotsi of SETA still 8 talking about the same contracts. Then on the 17th of 9 December 2014 you see an invitation to Gartner to attend a 10 meeting the next day and the next day it's on the 18th of 11 December 2014. In the meeting they discuss a number of 12 things but they are not recorded because we requested 13 Gartner to give us the notes of what was discussed on that 14 meeting, they never gave us. We requested SARS to give us 15 minutes of that date, they were not provided. But there 16 was now a condonation request later and in that condonation 17 request that's where now we pick what expired in the 18 meeting. In the meeting it's revealed that Gartner informs 19 SARS that I have a 2005 contract with SETA, you can 20 participate in that contract. It's on the 18th of December 21 2014. Shibubotsi of SETA not knowing that SARS is no 22 longer talking about that SETA contract, they have moved on 23 with their life responded on the 19th of December 2014 24 stating that there's no contract for IT advisory services 25 with EOH. From the 19th of December to the time that they</p>	<p style="text-align: right;">Page 2222</p> <p>1 referred to that committee because the committee met on the 2 21st. Considering the Bain and Company tender, why didn't 3 they consider also this one which is the question that SARS 4 may need to respond to. 5 MR KAHLA: Just before you move forward. 6 I just want to go back to the previous slide. I'm trying 7 to understand this. You have first here reference to the 8 EOH Mthombo contract with SETA on which there had been a 9 request to participate and that request to participate was 10 approved on the 8th of December. 11 MR TSHITANGANO: Right. 12 MR KAHLA: On the 19th of December you 13 have SETA stating that is there is no contract for IT 14 Advisory Services with EOH, was it because on the 8th of 15 December when the COO of SETA approved that she had not 16 been aware that the contract was no longer there or had the 17 contract expired in that about 11 days? 18 MR TSHITANGANO: There were contracts 19 between SETA and EOH Mthombo. 20 [14:45] But according to Shibubotsi's letter and what 21 SARS wanted those contracts were not for IT advisory 22 services, but they were other IT implementation contracts. 23 MR KAHLA: Did anything turn on that fact 24 that they were not for IT advisory services for purposes of 25 piggybacking, did it really matter whether they were for IT</p>

1 advisory services or for any other services that were
 2 provided by EOH Mthombo?
 3 MR TSHITANGANO: It matters because when
 4 you participate in a contract the same conditions and
 5 requirements of that bid must be applicable to what you
 6 want. If like what happens in most of the municipalities
 7 you find that one municipality has arranged a fleet
 8 contract. And if in that fleet contract they are buying
 9 certain model of the cars then if you participate in that
 10 contract you buy similar, you won't go and buy another one,
 11 I don't want this one, but I'm just using the contract to
 12 go and buy. Similar conditions and requirements must be
 13 applicable.
 14 MR KAHLA: Is it an objective fact that
 15 then on the 19th of December there was no IT advisory
 16 services contract with EOH and therefore there would have
 17 been an error in approving it on the 8th of December.
 18 MR TSHITANGANO: Maybe SARS may be the
 19 best one to answer that one, but –
 20 MR KAHLA: I'm asking from the review
 21 that was conducted.
 22 MR TSHITANGANO: No the review that we
 23 have done we will not reveal anything because when that
 24 letter was received on the 19th SARS has already abandoned
 25 that project of participating, therefore I wouldn't know.

1 They've already abandoned it that's why on the 17th they
 2 moved on, that's why they invited Gartner on the 17th, why
 3 they changed their mind I don't know.
 4 PROF KATZ: Sorry, could I ask one
 5 please? Page 17 all these errors and inconsistencies and
 6 dates and all of that, what inference are you drawing from
 7 all of that?
 8 MR TSHITANGANO: It's December, it's not
 9 a month for requesting suppliers to tender. In our own
 10 instructions when we receive procurement plans we assess
 11 them. And we check whether is there any institution who is
 12 going to advertise a tender between 15 December and 15
 13 January. And if we will see that tender there we write to
 14 you and says don't advertise the tender there because most
 15 of the companies they've closed, they're not there. And if
 16 you request a proposal during that time it's very difficult
 17 to get responses or responses from potential supplier
 18 because they're not there. You will see in the other one
 19 which – that's why I've used December holidays, because in
 20 April when they were requested to submit a proposal,
 21 they're given terms of reference on the 24th of April.
 22 Remember in April you have the holiday of the 27th and
 23 you'll have the 1st of May, now they responded and they said
 24 because of these public holidays we are unable to give you
 25 the proposal. We will only give the proposal on the 8th of

1 May. Why didn't they do that very same thing in December
 2 [inaudible]. That's what I'm saying there.
 3 PROF KATZ: Right thank you.
 4 MR TSHITANGANO: If you look at the heads
 5 that are there you'll see you have invoices which I'm not
 6 going go to them, there's 3.8, there's six, there's two.
 7 But the emphasis here which is a problem, I don't know how
 8 SARS was managing this because if you request consultants
 9 and they charge you per rate and per consultant and when
 10 they submit an invoice they only submit the invoice like a
 11 contractor who's building an RDP house for example.
 12 Because when you are building an RDP house what I want to
 13 see is that the foundation has been done. I'm not
 14 interested in knowing how many people were doing that
 15 foundation, but I will pay you because the foundation is
 16 done. And I'll pay you because I can see that you've put
 17 clay bricks up to the roof. You can pay, but in this case
 18 – in one document they will even compare the rates that
 19 Bain was charging and the rates that Gartner was charging
 20 and they will end up saying the rates that Gartner is
 21 charging are reasonable because of 1, 2, 3. And here are
 22 the people that were going to make available to SARS to do
 23 this work, but if you don't give me a timesheet I don't
 24 even know whether the people that you talked about have
 25 done that work. Or one person did everything, but you

1 still claim money for all those people. That's why when we
 2 asked them for timesheets they will tell me to say but look
 3 at the agreement we signed with SARS. We said first phase
 4 we'll get 10%, the second phase we'll get 50% and then
 5 that's how we claimed.
 6 MR KAHLA: Were there any particular
 7 milestones in relation to each of these phases? For
 8 example if you're using your RDP house, the milestone would
 9 have been the foundation for example. What milestones
 10 would have been there for example in relation to that first
 11 phase?
 12 MR TSHITANGANO: Some of them when you
 13 read, you know it will be something that is not measurable,
 14 there'll be maybe an area where they will say this one.
 15 But they'll say 10%, I don't know whether I've put that
 16 slide, you'll find that in one, I think it may have been
 17 the Star assessment where SARS and them they were arguing
 18 because Gartner was saying I'll claim in three phases. But
 19 SARS officials says no you need to revise, we're not going
 20 to be able to see how these things – it must 10%, we can
 21 agree that 10%, you will have done this one, this one you
 22 will have done. But it's not clear. If you can't measure
 23 then it becomes a problem. That's why I'm giving you an
 24 RDP house because it's easier to see the foundation is
 25 there and I pay you. But with this one where you charge me

1 per rate per consultant and maybe they were keeping a
 2 register somewhere which they will say these people were
 3 working at SARS from this date we can be able to see that
 4 with which we wouldn't have a problem.

5 Let me move, the procurement, if you were going
 6 to describe what a procurement happened here I don't know,
 7 but before I talk about these other issues let me bring you
 8 the letter that Gartner responded to us. Because we asked
 9 them 16(a)6.6 if you participate in a SETA tender that
 10 tender should have been arranged through competitive
 11 bidding. Then we ask them a question. Was the 2005
 12 contract between SETA and Gartner a product of competitive
 13 bidding. That's what we asked them. And you can read for
 14 yourselves, the responses are there. He says I do not have
 15 personal knowledge of the events, but, however, it was
 16 ultimately determined that based on the age of the document
 17 it was inapplicable. As a result of new master
 18 contractor's agreement, as a result a new agreement was
 19 entered into between SARS and Gartner at that time. On the
 20 basis of what? Because they know immediately they tell me
 21 to say there was not competitive bidding and therefore you
 22 can't 16(a)6.6. You can only utilise regulation if the
 23 2005 agreement was entered into using competitive bidding.
 24 Then he finds, he says if you need any additional
 25 information they will give us.

1 There are so many other questions where we asked
 2 them, some they responded, some they didn't. Then when we
 3 asked SARS officials but just tell us how was this
 4 procurement done because 16(a)6 was not used? How was this
 5 procurement done, was it just a gentleman agreement which
 6 says I give you work you start tomorrow. Then in July from
 7 the, you'll see there's a, what we call confirmation of
 8 memorandum compiled on 10 July 2015. And by this time,
 9 July 2015 the phase one has already been completed because
 10 the reports that were issued the date's 10 April and 21
 11 there. It goes with the BAC, Chairperson also recommended
 12 on the 17th of July and the Commissioner approved on the
 13 20th of July 2015. Amount condoned is 5 million and if you
 14 remember this phase one is 12.9 million. And we asked them
 15 what procurement is this, they said it was done through
 16 condonation, but when that condonation was done the
 17 procurement was already done because you only condone an
 18 irregular expenditure. Therefore this was a condonation of
 19 an irregular expenditure, but the amount was also not
 20 correct.

21 And if this was an irregular expenditure even in
 22 terms of the PFMA on discovery of an irregular expenditure
 23 you must report to the relevant Treasury before you even
 24 talk about your condonation. But you see what is
 25 problematic here it's what you see in my slide, I said sin

1 and forgive yourself because – if that provision is given
 2 to anybody then you see you depend on who is in charge of
 3 that institution. Because if you get a leader or an
 4 accounting officer or an accounting authority who's
 5 unethical all the procurement will be done through
 6 condonation because I have the right, I can sing, I know
 7 I'll forgive myself. But if I know that I, if you see
 8 you'll have to go through [inaudible] you'll be careful.
 9 Then condonation is done. Again the guidelines that come
 10 from Treasury also are problematic because you see
 11 sometimes if you look at the way the PFMA and the MFA they
 12 are written, they writing assuming that we are going to
 13 appoint saints and angels in this department. And that
 14 doesn't happen, there are no angels in this department
 15 including National Treasury where I work. We still have
 16 people who are pro-corruption and those who are anti in all
 17 these institutions. Therefore you must have rules that
 18 will ensure that you are able to deal with all these
 19 groups. But this they call it procurement through
 20 condonation. That is phase one of the procurement. I
 21 don't know whether there are questions from that.

22 MS STEINBERG: I have a question. Did
 23 you say that the proper procedure if the accounting officer
 24 wants to condone an irregular expense that they must alert
 25 the Treasury? Is that correct?

1 MR TSHITANGANO: Not the condonation, on
 2 discovery of any irregular expenditure the accounting
 3 authority, the accounting officer have got an obligation to
 4 report. We haven't come to the process of condonation.

5 COMMISSIONER: Sorry to report to who?

6 MR TSHITANGANO: To Treasury, in other
 7 words if you are a provincial entity you will report to
 8 your provincial Treasury. If you are a national entity you
 9 will report to National Treasury.

10 MS STEINBERG: And did they report?

11 MR TSHITANGANO: I asked my team and I
 12 asked even SARS for evidence because who had time to search
 13 everywhere because if some time back maybe we missed that
 14 document. And we said okay give us evidence that you have
 15 reported this matter. We still haven't received any
 16 document. Maybe they will produce a document like that
 17 before or after we have finished this presentation. But
 18 they haven't responded on that. Again what I want to tell
 19 you, the guideline says if you want to condone, the problem
 20 with this one is that the Commissioner was also involved in
 21 the transaction itself and you cannot condone what you also
 22 participated in in the process. That should have been
 23 referred. But before a condonation is done you must
 24 investigate or do an inquiry to establish who caused this
 25 irregular expenditure before you condone which was not even

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1 done here. The report that must go to the person who must
 2 condone must have a report through inquiry or investigation
 3 which will say yes there was an irregular expenditure of
 4 12.9 million. Then we need to know who caused this
 5 irregular expenditure. Was the person negligent or not, if
 6 the person was negligent action must be taken before the
 7 condonation is done. Did you receive value for money
 8 because if you did not receive value for money for that
 9 expenditure then there will be an element of fruitless and
 10 wasteful expenditure. And we don't condone fruitless and
 11 wasteful expenditure, it must be recovered from whoever
 12 caused that.

13 MR KAHLA: Mr Tshitangano, just help me.
 14 If I look on page 18, slide 18 you've got Commissioner
 15 Moyane approved the condonation on the 20th of July. Where
 16 else do you reflect his participation in this particular
 17 tender in which he then approved the condonation?

18 MR TSHITANGANO: Firstly the initiation
 19 of the contracts.

20 MR KAHLA: Mm.

21 MR TSHITANGANO: It's come through him.
 22 And when you read the proposal, that's why I said the terms
 23 of reference because I don't know who approved the terms of
 24 reference. When you read the proposal that is there they
 25 say the questions from the Commissioner, the Commissioner

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1 wanted 1, 2, 3 which was that – there may have been an
 2 engagement with the Commissioner and other stakeholders,
 3 that information is not there because we requested –
 4 remember if there was a terms of reference we will have
 5 seen it, who will send it when and this and this and this.

6 MR KAHLA: And this tender wasn't
 7 approved by the BAC.

8 MR TSHITANGANO: It was never submitted
 9 to any -

10 MR KAHLA: It was never –
 11 MR TSHITANGANO: because the BAC that met
 12 considering the Bain & Company tender on the 21st those
 13 minutes I read them here, there was no submission to the
 14 BAC. I don't know who approved the procurement.

15 MR KAHLA: And equally it could not
 16 participate in the agreement in the contract that existed
 17 with SETA.

18 MR TSHITANGANO: Already the –
 19 MR KAHLA: The -
 20 MR TSHITANGANO: They've already
 21 responded to Gartner to say yes that's why we entered into
 22 a new contract. It means there was no participation
 23 because that 2005 bid when you read it's very clear it was
 24 not a product of any competitive bidding.

25 COMMISSIONER: So are you saying then

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1 there was simply a contract entered into with no
 2 procurement process at all?

3 MR TSHITANGANO: There's no evidence that
 4 there was any – unless if you call that meeting a
 5 procurement process because it maybe in the meeting they
 6 discussed everything, that we don't know. They would have
 7 said – you'll see with the other ones that I'm going to
 8 talk about. Either in the meeting they gave them the terms
 9 of reference on the 18th, they may have said here are the
 10 terms of reference. And therefore you must go and work on
 11 them because there's no other meeting that is referred to.
 12 In other cases I requested email, you will see they give
 13 you an email for example.

14 [15:05] But in this one if you check this slide, you will
 15 see, you request notes the meeting of the, the meeting
 16 dated 18th of December And there is no evidence that there
 17 was additional meeting. Then we request email or letter
 18 accompanying terms of reference because in other cases they
 19 do like that. Then we requested email or letter
 20 accompanying proposal because you will find that that now
 21 will be responding to the terms of reference and they will
 22 issue a letter and SARS will issue an award letter even
 23 though it was then divisions, but in this case that why I'm
 24 just saying that basket is still there. It's waiting for
 25 SARS or Gartner to respond so that we can check it out. We

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1 can't check it out until they respond.

2 MR KAHLA: How long has that basket been
 3 waiting to be filled?

4 MR TSHITANGANO: This one?
 5 MR KAHLA: This one. This basket of
 6 information that you request. How long have you asked that
 7 it be filled.

8 MR TSHITANGANO: I think it should have
 9 been two weeks now where when we were requesting
 10 information to say we will give you tomorrow. Remember
 11 SARS on Thursday they requested an extension to say they
 12 will give us information on Friday and even on Friday the
 13 information - we thought maybe when we arrive this morning
 14 the information will be there about minutes and everything.
 15 The information is not there.

16 MS MASILO: This, I mean the contract was
 17 – is dated the 6th of January but I mean that, sorry, 6th of
 18 February 2015 and the memo requesting condonation was only
 19 compiled on the 10th of July 2015 and approved by the
 20 commissioner on the 20th July 2015. Why the delay because I
 21 mean the contract was signed in February, the work done
 22 within a ten week period up to April 2015, so why only
 23 apply for condonation in July? Is that normal? Is that
 24 proper?

25 MR TSHITANGANO: I can only say maybe it

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1 was an afterthought. SARS can better answer that. Now we
 2 are done with phase 1 of the project. The report that was
 3 issued I've already highlighted some of the recommendations
 4 and the findings that are procurement related because I
 5 want to only cover procurement. Then there is a proposal
 6 to do phase 2 and if you look at the information that is
 7 there, the proposal is dated 26 May 2015 and it talks about
 8 the validity of 60 days from 28 May 2015 and when you look
 9 at the original amount that is there it is R115.2-million
 10 excluding VAT. That was in the original proposal.
 11 We requested minutes of the BAC, the terms of
 12 reference, when they were given. Those are in the basket.
 13 SARS and Gartner may give us other information later but if
 14 you check now, Commissioner Moyane approved the division on
 15 20 July 2015 and the appointment letter dated 22 July 2015.
 16 The reasons that are given there, lapse of security,
 17 competition bid will delay the project. The contract now
 18 is signed by SARS on 31 July 2015 and Gartner in August
 19 2015. This is the letter that shows the proposal. The
 20 letter that is accompanying the proposal is there, it is 26
 21 May 2015 and it's having those people there and there's an
 22 attachment. The attachment is the proposal.
 23 And then you have this SARS letter which it's
 24 dated the 22nd of July. You'll see page 2 it was saying
 25 they should respond by 23 July 2015. And this phase 2 is

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1 the one that has got the big amount, R144. When it's
 2 revised from R115-million of the original proposal. Now
 3 it's R126-million excluding VAT. When you add VAT it will
 4 go to the R144 that they have planned. The problem with
 5 this procurement is still you want to see when was the
 6 terms of reference issued. Was there any letter or email
 7 accompanying this amount and whether the terms of reference
 8 was received by Gartner because for Gartner to issue that
 9 letter on the 26th of May there should have been processes
 10 before that.
 11 If you still remember what I said the report of
 12 phase 1 when you read it, it has got a date of the 10th
 13 April and the other one late of April. It may have meant
 14 that immediately they finalise or even before they
 15 finalised they may have been requested to submit a proposal
 16 for phase 2. The question to say but why, because if you
 17 see from the 26th of May until the contract is signed there
 18 was plenty of time, even if you wanted to do a shorter
 19 contract. I'm saying if you want proposal for a shorter
 20 period if that period was there because you have the June
 21 and half of the July there.
 22 PROF KATZ: Sorry, so the contract – this
 23 letter says please note that this notification does not
 24 constitute a binding contract. Take note that no binding
 25 agreement shall be inferred from this notification until

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1 such time that the parties have reached consensus,
 2 etcetera.
 3 MR TSHITANGANO: Right.
 4 PROF KATZ: And at the end it says you
 5 hereby must give acceptance of the award. So what date was
 6 the written contract signed?
 7 MR TSHITANGANO: Then the contract signed
 8 by SARS on 31st July 2015 and Gartner in August 2015. It's
 9 there in the documentation that we – this is the basket
 10 which SARS, Gartner may need to give us information so that
 11 we can check out this basket. I'm going to move to the
 12 next one because here you'll see this email is on the 10th
 13 of April. You must remember the other report is dated the
 14 10th of February but it's communication within SARS where
 15 they are talking about grab migration program. The acting
 16 CEO was supportive, we need a meeting so that we can
 17 discuss this matter but you see the reason why they want
 18 Gartner in that meeting. The reason why Gartner was attend
 19 is that our aim is to understand what scope exists to
 20 engage Gartner on this matter and also to understand any
 21 limitations relating to procurement, budgetary requirements
 22 that need to be met.
 23 This is the work if you remember I mentioned an
 24 instruction note three of 2003. This is the work that must
 25 be done by the accounting officer or the accounting

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1 authority because you can't go – you want a supplier to
 2 give you a proposal but you go to the supplier and says but
 3 how much are you going to charge me? Before you even
 4 receive a proposal, how much are you going to charge me?
 5 What will be the implications of this procurement and what
 6 Gartner should have responded if they were asking them this
 7 questions, Gartner should have said go and read my report
 8 that I've issued to you in April. It says there's
 9 inadequate procurement planning and if you want me to
 10 answer this question that you're asking me then I'm
 11 assisting you again to continue with the poor planning that
 12 my report is saying – says you were doing.
 13 The next slide. From the – that was the 10th of
 14 April. It's about the same grab migration program. This
 15 email is dated 24 April 2015. It's from Prakash of SARS
 16 and the cc's but it goes to Johan Jacobs and Andy Eksteen
 17 whose email is at rangewave.com. It's no longer a Gartner
 18 employee, this one. But if you read the contents, "dear
 19 Johan and Andy, attached is the electronic copy of the
 20 terms of reference that was discussed with Andy earlier
 21 today. We look forward to receiving your quotation in this
 22 regard as soon as possible please." You remember the first
 23 slide? They were going to ask Gartner certain questions.
 24 It may mean that in that meeting they said yes,
 25 you assist us to finalise the terms of reference. After we

1 have finalised the terms of reference we will request you
 2 to submit a proposal. If you are a supplier you are not
 3 prevented from assisting an institution to develop the
 4 specifications. You can do that but immediately you do
 5 that you disqualify yourself from bidding. If AG puts a
 6 general picks that this is what happened that expenditure
 7 must be declared irregular. You are the supplier, you
 8 prepared the spec and you tender again.

9 MS STEINBERG: Sorry, can you comment on
 10 the Rangewave?

11 MR TSHITANGANO: The Rangewave which is
 12 not there in the documentations because we asked them.
 13 They never responded to our letter. We said was there any
 14 subcontracting of some sort and they only responded on one
 15 matter which is the research one which is simple but on the
 16 other matter it's not. In this case if you are tendering,
 17 whether through a request for proposal like this one and
 18 you complete our standard bidding document which will be
 19 your SBD4 for declaring the conflict of interest. In this
 20 case if Rangewave like what was reported in the Daily
 21 Maverick article today, if Patrick Monyeke for example was
 22 a friend of the commissioner, in the SBD4 he will have
 23 declared to say there is a conflict which may not mean that
 24 you're going to be disqualified, which will mean that
 25 whoever is going to assess or evaluate, adjudicate will

1 check whether the conflict of interest that is there may
 2 affect this tender or not. That will be the SBD4.

3 Then you will have a standard bidding document
 4 called 6.1. It's about the BEE now. It requires any
 5 company that if you are tendering for any government job
 6 and you are subcontracting we need to know whom are you
 7 subcontracting to. That form to tell you that it's either
 8 I'm subcontracting 10%, 15%, 20% to this supplier. There's
 9 transparency then we know who. But in this case we are
 10 still talking about a terms of reference and from the terms
 11 of reference you can see that Gartner is using a sub-
 12 contractor. Early, even before the tender is awarded,
 13 there is some relationship between Rangewave and Gartner.

14 What we did not see because when you enter into
 15 that relationship it's important that also the relationship
 16 should be regulated. There should be a contract which also
 17 must be giving information because most of the time when
 18 the relationship between a main contractor and sub-
 19 contractor is sour they come to us for dispute resolution.
 20 Hey, Treasury, look at it. You know, they said I'll get
 21 30% now they are giving me only 10%. Then we ask them
 22 where is the contract that you signed between you and is
 23 the purchaser also aware of that? That's what I can say
 24 for now but we may still come to that because you'll see
 25 when we continue.

1 On the 29th of April you'll see there the email
 2 comes from Johan Jacobs. Thank you for this great
 3 opportunity and the very well-written terms of reference.
 4 And these are the terms of reference that they have written
 5 themselves. Read here. You see this one. "Unfortunately
 6 all the public holdings this week have thrown us a bit of a
 7 curve ball." They didn't say that in December. Now they
 8 are in. It's easier now. You can say whatever you want to
 9 say. But we do have a plan to get the proposal to you by
 10 next week Friday, the 8th. All our proposal go to Gartner
 11 head office in the UK for quality assurance and review so
 12 hence a bit of delay. Next week Friday.

13 The question that you may ask Gartner if they
 14 come, the December proposal, did it go through this
 15 process?

16 [15:25] Because they say there's no proposal that can go
 17 out without this quality process. Then we need to see what
 18 quality process head office did in the phase one project.
 19 But it was on the 29th of February. Do you have a question?

20 MR KAHLA: Yes. Mr Tshitangano, we need
 21 clarity. You're saying that or you make reference to this
 22 letter by Mr Johan Jacobs of Gartner commending SARS for
 23 the well written terms of reference and you say which they
 24 then had written themselves. If I see the letter from
 25 Prakash Mergay to Johan Jacobs and Andy Eksteen and they,

1 and he is forwarding the terms of reference, so who did the
 2 terms of reference? Is it SARS or is Rangewave/Gartner?

3 MR TSHITANGANO: Only three parties here
 4 are involved. You have Rangewave, you have Gartner and you
 5 have SARS. That's why even when you read this one, slide
 6 31, it will say "Neville and myself met with Andy yesterday
 7 to receive an update and to plan the Gartner response".
 8 You – they are planning that response on the terms of
 9 reference which they were discussing themselves.

10 MR KAHLA: But this, I'm still at a loss.
 11 I mean the letter –

12 MR TSHITANGANO: Which slide are you
 13 referring to?

14 MR KAHLA: Slide 30.

15 MR TSHITANGANO: Slide 30.

16 MR KAHLA: If I read slide 30 I get the
 17 impression that SARS is submitting a copy of the terms of
 18 reference to both Gartner and Rangewave and of course
 19 Gartner responds in 31 with all the compliments around very
 20 well written terms of reference. You're saying that these
 21 terms of reference were in fact drafted by Gartner or
 22 Rangewave and I'm trying to figure out how you arrive at
 23 that given that on this, on page 30 I get on the face of it
 24 on page 30 the terms of reference are actually being
 25 provided by SARS to Gartner and Rangewave. Unless you're

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1 saying that there had been a process prior to this in which
 2 Rangewave and Gartner had been involved together with SARS
 3 in co-determining the terms of reference? Is that what
 4 you're saying?
 5 MR TSHITANGANO: Let's start from slide
 6 29. There's a meeting arranged with Gartner and they are
 7 saying that meeting, the aim of that meeting is to
 8 understand what scope exists to engage Gartner on this
 9 matter and also to understand any limitations related to
 10 procurement budgetary requirements that need to be met.
 11 It's on the –
 12 MR KAHLA: Sorry.
 13 MR TSHITANGANO: The meeting is arranged.
 14 Then the other documentations are not there. Then you have
 15 slide 30. It's Prakash from SARS who is sending it to
 16 Johan Jacobs. The only assumption that you will make here
 17 is that whoever in Gartner may have delegated to Andy to
 18 attend a meeting because it says "attached is the
 19 [inaudible] copy of the terms of reference that was
 20 discussed with Andy earlier today". You are discussing the
 21 terms of reference with a sub-contractor representative.
 22 MR KAHLA: Okay, get you there.
 23 MR TSHITANGANO: "We look forward to
 24 receiving your quotation in this regard as soon as
 25 possible". Please.

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1 MR KAHLA: So you read in that was
 2 discussed earlier today that they co-worked those terms of
 3 reference rather than a case of we've gotten the terms of
 4 reference finalised, Andy. We would be submitting to you
 5 and to Johan. But your interpretation is the former, that
 6 that was discussed in your view was is that was co-
 7 determined between –
 8 MR TSHITANGANO: Yes. The first meeting
 9 was to ask them if you remember what I said. I said the
 10 first meeting was to go and ask Gartner certain questions
 11 relating to budget and procurement and not terms of
 12 reference. But then the next slide you find SARS officials
 13 discussing terms of reference with a supplier. What do you
 14 call that? And now they come and says this is very well
 15 written but they participated in that. And now they says
 16 at least in December we were very lenient. We could give
 17 you the proposal if you want. But now they are
 18 disorientated. This is the 27th, the 1st of May and which
 19 are only two compared to December where you have the 25 and
 20 you have the 26 and you have the first.
 21 Then the next one which is very interesting, this
 22 also it's from Gartner. It says "I have included bios of
 23 two people we got from 23rd Century Systems. Do they
 24 provide the relevant experience or knowledge you are
 25 looking for". This may be a second sub-contractor because

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1 their biography are whatever are submitted to, through this
 2 email. That's all for the grab migration. Let's move to
 3 the next one.
 4 The star assessment. Email on penetration
 5 testing meeting. If you check at this one, the meeting,
 6 the email first is on the 21st August. And then it's
 7 proposing a meeting to discuss this penetration testing.
 8 Then the email of the 20th is attached which was talking
 9 about how vulnerable SARS is and we need this and this.
 10 But look at the last sentence there. They still also need
 11 Gartner. The input needed from Gartner relates to the
 12 service providers in this discipline. Are you saying SARS
 13 does not have capacity to do a request for information or
 14 an expression of interest to establish who can assist them?
 15 They must go to Gartner and says can you tell us about your
 16 other competitors that we can also invite them to compete
 17 with you. I'm saying that's what the email is saying.
 18 What I don't know is how Gartner responded, whether they
 19 gave them the names but they may have said no, but you
 20 guys, what are you talking about, we are here. Why do you
 21 need our competitors to compete with us?
 22 Then on the 4th of September you see the email
 23 from Gartner and it's talking about the next steps. SARS
 24 must provide the Gartner team with architecture overview
 25 diagram, the security issues it's like they've been thrown

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1 away. Because you see when you check there's somewhere
 2 when a legal opinion was talking about the confidential
 3 information movie. But if you check the way the
 4 appointment was done in December and now even in first two
 5 and the other it's like security was at the back of their
 6 mind because firstly when those people they were going to
 7 work in that environment, you need suppliers who have
 8 certain security clearance to do whatever they wanted to
 9 do. If security was the main issue which you will see in
 10 this one because at the end the project was stopped after
 11 it has been implemented because they said we must align
 12 ourselves with the state security agency. Again you must
 13 be careful. These consultants that are going to be used in
 14 this environment where you have confidential information,
 15 are they also have certain security clearance of some sort.
 16 Because if you don't do that then it means you don't care
 17 about this confidential information and you can't use that
 18 when you say it's because these guys who did not even have
 19 security clearance they've done phase 1 therefore we can't
 20 get another one to do phase 2. And exactly the same thing
 21 when Gartner says conduct a vendor contracts assessment for
 22 compliance. The same report was going to be given to Grant
 23 Thornton. Why was the confidentiality thing not quoted
 24 there? Why should it only be quoted when we want a single
 25 source? Because they should've said ja, you can't appoint

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1 another supplier who will also do the vendor contracting or
 2 we'll engage our lawyers and this one because you can't
 3 bring another player. I'm just giving an example because
 4 there's somewhere where confidentiality is used as for
 5 impracticality to say you can't bring another supplier.
 6 Then on the 8th of September there "have the team managed to
 7 review the scoping document? Is there any feedback?
 8 Please advise when it will be convenient to set up a follow
 9 up call to finalise the scope". See who – it's coming from
 10 Gartner this email. Again preparing their own terms of
 11 reference.
 12 Then this one is very interesting. They say "we
 13 have made changes, sorry, we have made changes, we have
 14 made the changes discussed in last week's meeting to cover
 15 the skills transfer and the retesting. Terry is here until
 16 tomorrow afternoon should you want a quick discussion to
 17 clarify anything, thank you". This star assessment alone
 18 may not give us the money that we want and we are adding
 19 additional work to that scope and that's what that email is
 20 saying. And you will see even in the letter of
 21 accompanying proposal. This letter dated 19 October 2015,
 22 if you read what is in this part of this letter, it says
 23 "in addition to star assessment Gartner will carry out the
 24 following three additional tests".
 25 They are just telling SARS you have to add these

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1 three because we are not only going to do star assessment
 2 alone, we need these three. And from there our offer is
 3 valid for 60 days and this and the letter is signed. If
 4 this scope changed, represent your requirements, please
 5 sign, a year later it was signed. This was an addendum
 6 later which was signed. I'm just skipping the other. If
 7 you look at the initial scope it was going to have phase 1,
 8 phase 4, phase 5, 6, 7, now there's a problem. The removal
 9 of the remaining work component C, the major components now
 10 are removed and what they are saying here is that at the
 11 programme Steercom on 19 October 2016 SARS confirmed that
 12 they no longer require Gartner involvement due to the need
 13 to align with the state security agency. Therefore what
 14 was ever agreed now must be stopped but we will not cancel
 15 the contract at all, we will still allow you to do other
 16 things so that you can still have the same money that you
 17 wanted to have.
 18 MR KAHLA: So the point you're making is
 19 if I go to page 22 in approving the deviation there's a lot
 20 said around if that is not approved there will be a lapse
 21 in security.
 22 MR TSHITANGANO: Correct.
 23 MR KAHLA: But when we then get to page
 24 40 –
 25 PROF KATZ: 3.

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1 MR KAHLA: - what is that –
 2 MR TSHITANGANO: 43.
 3 MR KAHLA: 43.
 4 MR TSHITANGANO: Yes.
 5 PROF KATZ: Ja.
 6 MR KAHLA: The issue of security is put
 7 aside because there's now a project to be run with SSA?
 8 MR TSHITANGANO: Overtly they may not –
 9 whatever was discussed with the State Security it may not
 10 be recorded here because remember whatever they –
 11 MR KAHLA: Ja.
 12 MR TSHITANGANO: - do is classified
 13 information. But they may have raised issues on the way
 14 that project was done and that's why it may have been
 15 stopped. They may say other things but that's how I read
 16 it. They will not just come and say stop a project if
 17 there are no problems.
 18 MR KAHLA: But this is now in October
 19 2016 and –
 20 MR TSHITANGANO: Right, because –
 21 MR KAHLA: - and the deviation was
 22 approved in about July 2015 with an emphasis of urgency,
 23 bearing in mind the recent relation to security lapses.
 24 MR TSHITANGANO: Ja, the –
 25 MR KAHLA: But a year later that's –

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1 MR TSHITANGANO: Correct.
 2 MR KAHLA: - that issue has not been
 3 attended to. The issue that gave rise to urgency -
 4 MR TSHITANGANO: I think –
 5 MR KAHLA: - does not come up in the work
 6 that's been done as of October 2016.
 7 MR TSHITANGANO: Ja, but –
 8 MR KAHLA: More than a year later.
 9 MR TSHITANGANO: Correct. I think you
 10 are correct. If you read what Gartner said in that report
 11 which they were saying "it appears to Gartner that
 12 inadequate procurement planning could have created
 13 emergencies which emergencies are then used to justify
 14 division from procurement" this is what happened.
 15 MR KAHLA: But Gartner was saying it in
 16 relation to assessment of other procurement –
 17 MR TSHITANGANO: Correct.
 18 MR KAHLA: - arrangements.
 19 MR TSHITANGANO: But even –
 20 MR KAHLA: But find it's self in the same
 21 situation –
 22 MR TSHITANGANO: Correct. That's why I
 23 started by the recommendation to say if you are here to
 24 assist me you saw that I failed. My strategies that I was
 25 using they were not correct and now you are in. You have

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1 this report therefore you must assist me. But you still
 2 part, in other words see that's why I brought in their code
 3 of conduct because it says "we" –
 4 PROF KATZ: Conflict.
 5 MR TSHITANGANO: - "do not settle in the
 6 status quo" and the question that, it says "never settle
 7 for the status quo". Is it what they applied here? They
 8 also say "see opportunities where others don't". I don't
 9 know whether they will say now that these opportunities
 10 here, those are the questions that I'm asking because their
 11 code is very clear and immediately they are in we are
 12 applying this code.
 13 [15:45] Their officials should have told SARS, hey do not
 14 lead us into temptation because when this investigation is
 15 done which is very serious because that investigation was
 16 just going to be fruitless and wasteful expenditure, the
 17 12 million, the 14 and the 50 or 60 million because it
 18 should start with Gartner, not the previous notification.
 19 It should start with them. But because the timeline was
 20 2014 they said ah it's fine because we are not covered,
 21 maybe but I don't want to go on the maybe. They will have
 22 to respond themselves.
 23 MS STEINBERG: It seems to me that the
 24 other question that does arise, clearly a very security
 25 sensitive project.

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1 MR TSHITANGANO: Yes.
 2 MS STEINBERG: Because it's a simulated
 3 target attack on and response so it's seen how robust SARS'
 4 systems are.
 5 MR TSHITANGANO: Correct.
 6 MS STEINBERG: Now it seems to me that
 7 it's hard to tell but there might have been three companies
 8 involved.
 9 MR TSHITANGANO: Yes.
 10 MS STEINBERG: There's Gartner, there's
 11 Rangewave -
 12 MR TSHITANGANO: And 23rd Century.
 13 MS STEINBERG: And 23rd Century.
 14 MR TSHITANGANO: Yes.
 15 MS STEINBERG: So I think the question
 16 that arises is who if any of the three have security
 17 clearances.
 18 MR TSHITANGANO: You are right, that's
 19 the question that I'm asking because you know even Public
 20 Works when the funeral for a minister or a deputy minister
 21 the companies that they invite for marques they should have
 22 certain clearance, you are not in that panel unless you
 23 prove that you have certain clearance from the State
 24 Security Agency but with this one if nobody was concerned
 25 about that then I have a problem.

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1 COMMISSIONER: Ja.
 2 MS STEINBERG: Well it would render
 3 SARS's systems vulnerable basically, potentially vulnerable
 4 if people aren't cleared and you're saying there's no
 5 documents you've seen suggesting that anyone had security
 6 clearance?
 7 MR TSHITANGANO: If you start from the
 8 December one, where those people the meeting was on the 18th
 9 of December and Gartner was claiming that those people are
 10 only available from the 19th of January and it was going to
 11 be very difficult because SARS and the state security
 12 agency should have said I have these people who want to
 13 work in this environment, this environment, the secure
 14 environment, we don't just want anybody and therefore can
 15 you quickly check them, whether they are cleared or not.
 16 You can't just bring any person in that environment. But
 17 according to the evidence that we have, unless they have
 18 another mechanism, from the documents that we have there
 19 was no requirement like that which says for you to submit a
 20 proposal your company should have been cleared at a
 21 confidential level or whatever level that they want. Your
 22 employees should have, what you see is the confidential
 23 document that you sign as a supplier but you already have
 24 taken, because there's some areas even where you don't need
 25 a cleaner because the cleaner will sweep and take the

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1 confidential documents. But I don't know, that's what
 2 you'll ask SARS and -
 3 MS STEINBERG: Well it's another question
 4 for your basket.
 5 MR TSHITANGANO: Correct.
 6 COMMISSIONER: May I just understand, if
 7 we go back to 43, the addendum.
 8 MR TSHITANGANO: Yes.
 9 COMMISSIONER: So now you've removed
 10 these work components.
 11 MR TSHITANGANO: Yes.
 12 COMMISSIONER: But you just keep the
 13 contract going and add something else?
 14 MR TSHITANGANO: Let's look at -
 15 COMMISSIONER: You then replace it with -
 16 MR TSHITANGANO: Let's go to -
 17 COMMISSIONER: Program support.
 18 MR TSHITANGANO: Alright that's what -
 19 COMMISSIONER: But can you then go and
 20 say look I've done everything to buy a truck, now I don't
 21 need the truck, I want a bag of oranges. Can you do that
 22 in the procurement, in the contract because you're changing
 23 the content of what you're buying now?
 24 MR TSHITANGANO: SARS will have to
 25 respond, maybe they'll come and say Gartner was going to

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1 claim a breach of contract and, but when you read 3 there,
 2 the impact of the change, it says the remaining phases of
 3 the Star project as indicated above.
 4 COMMISSIONER: Ja.
 5 MR TSHITANGANO: Will be replaced with
 6 programme support for the security strategy implementation,
 7 invoices for the balance excluding VAT will be invoiced
 8 monthly. From there the documents are signed.
 9 COMMISSIONER: Ja.
 10 MR TSHITANGANO: And they, life is
 11 normal. They will get whatever, whether that work was
 12 assessed and it's equivalent to what they were supposed to
 13 do previously I don't know whether that was done because
 14 there should have been assessment first to say you were
 15 supposed to do the phases and these phases we wanted this
 16 expertise. Now with this programme support they're talking
 17 about, do you still need that top service for, I'm saying
 18 from your consultants or maybe you just need ordinarily
 19 consultants. But you don't see that this work is, it may
 20 have been done between the two, maybe they'll submit
 21 documents.
 22 PROF KATZ: And you don't see what impact
 23 it had on price?
 24 MR TSHITANGANO: correct.
 25 PROF KATZ: They just say invoices for

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1 the balance will be invoiced, it doesn't say, has it
 2 changed the price because the scope's changed.
 3 MR TSHITANGANO: And the addendum is
 4 accepted, it's signed and implementation, but I'm just
 5 showing you how procurement was done. After, you remember
 6 what I said when I was talking about Bain and Company they,
 7 the BAC will raise red flags and immediately there are red
 8 flags then you need to address the red flags before you
 9 appoint but they were not addressed. It's exactly the same
 10 thing, you see here are the red flags. But here you have
 11 two parties, Gartner did a review of the previous
 12 modification and they are saying SARS here are your
 13 problems. But phase 2 says okay now that you have
 14 identified our problems can you also assist us to deal with
 15 our past. But you don't see any correction. The status
 16 quo continue. That's why I'm questioning their code of
 17 conduct and what was implemented which you'll have to ask.
 18 MS STEINBERG: But if I may say we don't
 19 know that Gartner's assessment of the modernisation
 20 programme is correct or not. We mustn't assume they were
 21 correct, that SARS had made those procurement
 22 irregularities in the decade before, that's Gartner's
 23 assessment, it's not Treasury's assessment?
 24 MR TSHITANGANO: correct, but remember
 25 I'm giving the report.

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1 MS STEINBERG: I understand. I just want
 2 to clarify -
 3 MR TSHITANGANO: correct, correct, I am
 4 only giving what the report says and the reason why I was
 5 doing that I want to show you that you, your left-hand says
 6 this and your right hand, you can't be a pro-corruption and
 7 your right hand is anti-corruption. But that's what you
 8 see here.
 9 MS STEINBERG: I understand.
 10 MR TSHITANGANO: There.
 11 COMMISSIONER: Are we going to the
 12 conclusion?
 13 MR TSHITANGANO: Ja, unless if there are
 14 questions?
 15 MS MASILO: I have one question.
 16 COMMISSIONER: Yes.
 17 MS MASILO: Can we just go back to slide
 18 15. In respect of phase 1, it states that the value of
 19 phase 1 was R12.9 million.
 20 MR TSHITANGANO: Yes.
 21 MS MASILO: But on slide 18 it shows that
 22 the amount condoned was R5 million, what about the
 23 7 million?
 24 MR TSHITANGANO: I think the writers of
 25 the document there, it may have been a copy and paste.

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1 They may have copied another letter for condonation and I'm
 2 saying that's what I normally see because this condonation
 3 should have been 12.9 but the amount that is shown there is
 4 5 million, it will, it may have been a copy and paste
 5 error.
 6 MS MASILO: But what's the implication of
 7 that? Was Gartner paid 5 million or 12 million in respect
 8 of phase 1?
 9 MR TSHITANGANO: No, Gartner was paid
 10 12 million but it means the commissioner did not conclude
 11 the whole amount. Therefore whatever was recorded in the
 12 financial statement, because even the condonation was in
 13 July -
 14 MS MASILO: 2015.
 15 MR TSHITANGANO: 2015.
 16 MS MASILO: Yes.
 17 MR TSHITANGANO: Therefore in their
 18 2014/15 which is here and you need to check, they need to
 19 check whether the irregular expenditure, because even if
 20 you condone irregular expenditure it must go to your books,
 21 you must show the irregular expenditure and then you must
 22 show the condonation and then it becomes zero. But you
 23 don't just say condone this out because we need
 24 transparency, we need to know. You can also check their
 25 condonation register whether it's 12 million or 5 million,

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1 but what the commissioner approved was 5 million instead of
 2 12.9.

3 MS MASILO: Thank you.

4 COMMISSIONER: Now do you know anything
 5 about subcontracting of this contract?

6 MR TSHITANGANO: From the documentations
 7 it's not clear, you see when you read that, they will
 8 indicate to you that, that's why what we wanted, when we
 9 requested timesheets we wanted to see all the people who
 10 worked on the projects and from those timesheets we will
 11 know whether the people who were working on the projects
 12 are Gartner's employees or they are employees of companies
 13 that were subcontracting. But if you don't have a
 14 timesheet then it becomes a problem because you rely on the
 15 profile that they have given us here to say Andy will be
 16 the coordinator of grab migration and when you read the
 17 profile of this Andy, in my other file, they don't even say
 18 Andy is an employee of Rangewave.

19 COMMISSIONER: Ja.

20 MR TSHITANGANO: They write as if Andy
 21 it's an independent consultant, why are they hiding to say
 22 this is employee of Rangewave.

23 COMMISSIONER: Do we know anything more
 24 about subcontracting?

25 MS STEINBERG: No. We have asked the

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1 questions of SARS but we as yet don't have an answer.

2 COMMISSIONER: Do we know the role of
 3 Rangewave?

4 MS STEINBERG: No.

5 COMMISSIONER: Well why was Rangewave,
 6 why was Prakash sending to Johan Jacobs and Andy Eksteen?

7 MS STEINBERG: We don't know.

8 MR TSHITANGANO: It's on the migration.
 9 On the migration, when you come, you remember these
 10 projects, what I only covered is phase 1, phase 2 you have
 11 migration project. That's where you see Andy's involvement
 12 and even in the profile that they gave which is there in
 13 your, for example in your document, they show a diagram
 14 like this and in the diagram like this you'll see they said
 15 project lead Andy Eksteen. This is here but when you read
 16 now where they talk about this Andy here it's, you will not
 17 know that he's an employee of a sub-contractor, it's like
 18 he's an independent consultant. That's why I'm saying in
 19 terms of SEM rules if you engage a sub-contractor you must
 20 disclose, even the general conditions is very clear. You
 21 may have engaged them but in this case even before the
 22 appointment, the proposal was submitted Andy was already
 23 introduced and he was working there. But those are some of
 24 the questions that SARS, if they will respond and Gartner
 25 should be able to highlight to say, especially with the

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1 security issues that we are talking about, the environment
 2 where they were supposed to work it should have been
 3 disclosed to say we have this subcontractors, you must be
 4 assured that this and this and this, they meet all the
 5 security requirements that you need but in the terms of
 6 reference it was not there.

7 PROF KATZ: And the on time sheets for
 8 who did what?

9 MR TSHITANGANO: No in all the responses
 10 that we have, we'll give you they says there was no need to
 11 keep timesheets because we were claiming according to the
 12 agreed percentages which will say you'll do this one it's
 13 50% but as a purchaser and I know that there are more than
 14 one person involved I would have expected, I must know who
 15 was involved in this project because if you read their
 16 profiles, they will say Andy was involved in that project,
 17 that project and that project, how do they know if they
 18 don't keep timesheets because, and normally with
 19 consultancy, audit firms those people may be sitting at
 20 SARS and dealing with five clients in a day then you need
 21 to say two hours I was dealing with client 1, three hours I
 22 was dealing client 2, something like that.

23 MS STEINBERG: Mr Tshitangano, is there
 24 any reference to the BEE requirements that ordinarily
 25 attend public tenders, public procurements, have you seen

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1 anything?

2 MR TSHITANGANO: You mean the documents?

3 MS STEINBERG: Yes.

4 MR TSHITANGANO: From the documents that
 5 we have received up so far there's nothing, we'll make a
 6 follow up on the other letters that they have not responded
 7 because the only area where they said there was no sub-
 8 contractor which I may believe is the advisory and research
 9 where you go to the database and research something. There
 10 you may not have a sub-contractor but in the other areas
 11 subcontracting may have been there which is the evidence
 12 that we have seen from the Rangewave.com.

13 MS STEINBERG: So you're suggesting the
 14 subcontracting might have helped Gartner meet the BEE
 15 requirements?

16 MR TSHITANGANO: No, but how was SARS
 17 going to assess that because you remember for you to be
 18 able to assess and see this one then it should have been
 19 disclosed. In this case there is no document, their
 20 proposal should have indicated to say I'm meeting this
 21 requirements because 1, 2, 3 likely with the amounts that
 22 it was even before because with the regulation 2017 it
 23 prescribed say the amounts was above 30 million like with
 24 the 144 million of phase 2. If it was done after 2017 the
 25 subcontract they should have subcontracted 30% of that to a

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1 subcontract. It happened before and regulation 2011 was
 2 not prescribing like what regulation 2017 prescribed the
 3 30%.

4 MS STEINBERG: Okay. Do you want to
 5 conclude?

6 MR TSHITANGANO: Yes, I want to. You
 7 know if you check but why because the discussion of the
 8 scope it's like, you know we, because we do a number of
 9 things here. It's like it's fashionable these days where a
 10 purchaser and a supplier meet, discuss the scope and then
 11 the tender is awarded. Last year we also had one incident
 12 in National Treasury, exactly the same thing happened, we
 13 appointed a supplier, given a letter of appointment,
 14 requested for a meeting to negotiate, after the negotiation
 15 meeting the supplier went to another meeting where the
 16 scope was discussed.

17 [16:05] After that meeting (inaudible) write a letter to
 18 say you know I attended this meeting the scope that was
 19 discussed there is similar to the scope that you have
 20 appointed me therefore I'm no longer exiting. I'm just,
 21 you to say it's like, it's not only common to SARS. It's
 22 something that we need to look at as Treasury. But the
 23 main question is when all these things were happening in
 24 SARS, and not only SARS, in other institution, where are
 25 the whistle-blowers? Because somebody should have thing to

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1 say Gartner gave us a report where they say the previous
 2 modernisation, most of the contracts were irregularly
 3 appointed. But they are also being appointed irregularly.
 4 Somebody should have reported these matters somewhere else.
 5 And the fact that we did not receive any it shows you that
 6 the problem is the system because whistle-blowers are not
 7 protected. There's no effective protection of the whistle-
 8 blowers in this country and that's why some of these things
 9 you will not pick them on time because it's only whistle-
 10 blowers who would've told you to say but go and check that
 11 contract and then you will have to check 1 to 3. And it's
 12 one area of concern that we obviously we need to look at.

13 The last point that I want to bring, it's
 14 immediately after I testified on the Bain and Company. You
 15 see the, there was a dossier now to say you know, Solly is
 16 just stoning other people there. He's also very corrupt.
 17 I discussed with my DG, he may be looking at the matter but
 18 what was key these people, obviously they are pro-
 19 corruption, they are all out there because they're just
 20 looking for any skeleton. Unfortunately they tried to
 21 write whatever they are writing and if their story was good
 22 enough then today otherwise I was just going to give you
 23 evidence and nobody would look at it because they will say
 24 but ja he also received this loan for his from PBS which
 25 was not the case. He benefited from this CCTV bonanza they

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1 are there. But I'm just telling you that when you come and
 2 speak the truth here, you threaten too many people and
 3 those people are not happy. They're all out there looking
 4 for anything so that they can discredit anybody. So with
 5 me likely some good South Africans who came across that
 6 dossier which is still in transit, maybe some of the
 7 journalists will get it there. And in that document they
 8 write things that you will not believe.

9 COMMISSIONER: I will by the way.

10 MR TSHITANGANO: They will tell you no, I
 11 don't know whether they photo-shopped my bank statement
 12 because as I say this guy has got so many millions in the
 13 bank account and my bank account has never tasted that, you
 14 know. But I'm just telling you that you know to come and
 15 give evidence here that's when I was reading before saying
 16 some people are saying you know they need to be in camera
 17 because at least nobody will know that Solly was there.
 18 But whether you are in this Commission or on the other
 19 Commission these people they are out there just to
 20 discredit all of – I just wanted you to know because I may
 21 still come with other matters but you must know that
 22 immediately you give evidence like I would have done -

23 COMMISSIONER: Well we still hear -

24 MR TSHITANGANO: - threaten so many
 25 people.

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1 COMMISSIONER: We'll still hear Gartner
 2 perhaps and they might disagree with you and say Solly's
 3 not, he's misleading us but we'll see.

4 MR TSHITANGANO: Correct. The issue is
 5 not, I'm only talking to the documents that are there and –

6 COMMISSIONER: Yes, no of course.

7 MR TSHITANGANO: - we have given them the
 8 opportunity to dispute other things like what they did with
 9 16(2)6. You remember, I asked them was this agreement a
 10 product of a competitive bidding. They said no. Then how
 11 was the procurement done?

12 COMMISSIONER: True. Ja.

13 MR TSHITANGANO: I don't have a problem,
 14 but the question that you see you may need to put to
 15 Gartner if you check at my slide 46, the next one there
 16 which is a summary of what they said. They said rules were
 17 moulded to achieve certain procurement decisions. But I'm
 18 saying when I look at the other projects, grab migration,
 19 Star assessment and phase 2, some of those things the
 20 moulding of rules were also there. Government decisions on
 21 identification selection of suppliers not good, exactly the
 22 same thing you see when you go to the project. Gartner was
 23 aware that impracticality was used as a third reason for
 24 deviating by SARS but even when they were appointed the
 25 same reason was used, impracticality. Gartner in their

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1 report says vendors were irregularly appointed by SARS and
 2 a supplier should be appointed which was Grant Thornton who
 3 was appointed for initial 12 million and later they wanted
 4 50 million which we rejected. But we rejected because we
 5 wanted first to read – you, if you have done a preliminary
 6 report the second report must be based on this one. They
 7 should say we found that Solly after awarding this contract
 8 he bought a property for cash. There must be further
 9 investigation. I'm saying if you have a report and it says
 10 like that then you can say ja, fine, let's go to the second
 11 one. But if the report doesn't give you any meat you can't
 12 say go ahead because then it will be fruitless and wasteful
 13 expenditure. Gartner's recommendation which I'm saying
 14 when you look at what they recommended and you look at
 15 their conduct when really if they want to dispute they may
 16 dispute but if you participate in the development of a spec
 17 and you also submit your proposal and you are asked
 18 questions about your competitors and you respond. Then you
 19 are undermining the government's efforts to fight
 20 corruption. That's my view. Some of the questions that
 21 you can ask Gartner from their code of conduct are there, I
 22 just put them on page 47. That's all what I can say today.
 23 COMMISSIONER: Just tell me about, you
 24 say there's a dossier out and it seems to be the way things
 25 go, so dossier's get prepared and is there such a thing

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1 that you know about that for yourself now?
 2 MR TSHITANGANO: Yes. That – only after
 3 – it may have been there because I remember some time back
 4 there was a corruption case that was opened in Pretoria
 5 there, where they said Solly was involved with certain
 6 bidders who lost and they saw me somewhere and I received
 7 money and the, that supplier opened a criminal case at
 8 Sunnyside. Then I wrote to them I says ja, give me
 9 evidence the Hawks and nothing happened with that one
 10 because I was knowing that I was clean. But with this one
 11 immediately after I've given evidence here then they
 12 started, I think the dossier now, they started putting it
 13 quicker to say before he goes either to the other
 14 Commission or this one, he's also corrupt. We must deal
 15 with him. We must discredit him. But the issues that I
 16 raise in that dossier I've –
 17 COMMISSIONER: So where is this dossier?
 18 MR TSHITANGANO: Good South Africans they
 19 have the dossier. They know where the dossier is but if I
 20 have a copy I will give you a copy.
 21 COMMISSIONER: No, I don't want to see it
 22 but I just want to know where –
 23 MR TSHITANGANO: Correct, but it is
 24 there, it's moving around. They are circulating it so that
 25 –

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1 COMMISSIONER: Ja.
 2 MR TSHITANGANO: - maybe one will – they
 3 should have written, they're late because I've already
 4 given it to them. Because they will not rub, erase what I
 5 have said here. Otherwise I will not be confident like
 6 today if they will say, ja, but because of [inaudible] they
 7 just want to say Solly has got millions in my account I
 8 don't even have. I don't know where they got those zeros
 9 from.
 10 COMMISSIONER: Don't tell us how much
 11 you've got in your account. Thank you very much indeed, I
 12 appreciate that and I suppose this will add to your dossier
 13 you say. But thank you very much and you know, you're
 14 quite correct to say that one asks oneself shouldn't one
 15 just hear all of this in camera to protect people, but at
 16 the same time the public needs to know about these things
 17 and you know I give a report to the president who may not
 18 even open it to the public for all I know. And so one
 19 tries to have these things public and I keep saying to
 20 people well I don't, can't force, I don't want to force you
 21 to take risks but you've got to look at your own conscience
 22 that's all. Thank you very much.
 23 MS STEINBERG: Thank you very much.
 24 MR KAHLA: Where are we on Grant
 25 Thornton?

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1 COMMISSIONER: - coming to as far as –
 2 MR KAHLA: So this is, I thought we're
 3 dealing with both Grant Thornton and so this is the next
 4 instalment?
 5 MR TSHITANGANO: Yes, if we will get,
 6 because what is there, they've done the 12 million which
 7 what I will do I'll send you because the, I'll send you the
 8 copy of the report which they've done because I have a
 9 copy.
 10 COMMISSIONER: We've got the Grant
 11 Thornton report.
 12 MR TSHITANGANO: Yes, but out of that
 13 report when I, there was nothing that I could say that's
 14 why I, we stopped the first second phase.
 15 COMMISSIONER: Ja, okay.
 16 MR TSHITANGANO: Of 60 million.
 17 COMMISSIONER: Ja.
 18 MR TSHITANGANO: But the 12 million is
 19 gone.
 20 COMMISSIONER: Ja. Thank you very much
 21 indeed.
 22 MR KAHLA: Thank you.
 23 COMMISSIONER: Is that it for the day?
 24 MS STEINBERG: Ja, that's our programme.
 25 COMMISSIONER: What time are we starting

1 tomorrow?
2 MS STEINBERG: Tomorrow morning we start
3 at 9.
4 COMMISSIONER: Okay, thanks.
5 PROF KATZ: Thanks a lot.
6 COMMISSIONER: Thank you.
7 MR KAHLA: Thank you.
8 MS STEINBERG: Thank you.
9 [INQUIRY ADJOURNED]
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