

**REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF THE
CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA 1996 AND SECTION 8(1) OF
THE PUBLIC PROTECTOR ACT 1994**



REPORT NO: 7 of 2011/20

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***“Allegations of maladministration in connection with financial mismanagement,
conflict of interest, procurement and Human Resource appointment irregularities by
the Passenger Rail Agency of South Africa (PRASA)”***

**REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF
MALADMINISTRATION RELATING TO FINANCIAL MISMANAGEMENT,
CONFLICT OF INTEREST AS WELL AS PROCUREMENT AND
APPOINTMENT IRREGULARITIES AGAINST THE PASSENGER RAIL
AGENCY OF SOUTH AFRICA (PRASA)**

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LIST OF ACRONYMS

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

EXECUTIVE SUMMARY

- (i) This is the second volume of the Public Protector's report (**Volume 2 Report**) issued in terms of section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, 23 of 1994.
- (ii) The report communicates my findings and the appropriate remedial action to be taken in terms of the remedial power given by section 182 (1) (c) of the Constitution, following an investigation of complaints, initially lodged by the South African Transport and Allied Workers Union (SATAWU) in 2012 and later pursued by the National Transport Movement (NTM), in connection with alleged maladministration and related improper conduct involving procurement irregularities, conflict of interest, nepotism and human resources mismanagement by the former Group Chief Executive Officer (erstwhile GCEO) and other functionaries at the Passenger Rail Agency of South Africa (PRASA).
- (iii) The complaints and issues being reported on in this report were deferred in the first report of the Public Protector, issued on **24 August 2015**, titled **"Derailed"** and hereafter referred to as **Volume 1 Report**. PRASA is an important strategic organ of state and therefore its handling of public finances and procurement of goods and services has implications for the efficient and effective delivery of public transport, in compliance with the principles set out in section 195 of the Constitution.
- (iv) Section 195 of the Constitution provides, among others, a requirement that:

"Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles: a. A high standard of professional ethics must be promoted and maintained. b. Efficient, economic and effective use of resources must be promoted...."
- (v) PRASA is an organ of state listed as a National Government Business Enterprise under Schedule 3B of the Public Finance Management Act 1 of 1999 (PFMA). As a



public infrastructure provider, it also has implications for the South African economy at large. It has subsidiaries and divisions, namely: **PRASA Rail** and **Autopax** operating commuter services, **PRASA Tech** managing the PRASA Group strategy and **Intersite / PRASA Cres** managing the corporate property portfolio.

- (vi) PRASA is controlled by the PRASA Board of Control (PRASA Board), chaired by a non-executive Chairperson. In terms of section 49(2) (b) of the PFMA, the board is its Accounting Authority. The Group Chief Executive Officer (GCEO) of PRASA has delegated authority in terms of **PRASA Powers and Authority of the Board and Delegation of Authority** (Delegation of Authority).
- (vii) In essence, the allegations in the deferred complaints were specifically that:
 - 1. PRASA improperly incurred an upfront payment, to a developer of the City Mall for the construction of an underground train station (Bridge City Project), without going on a bidding process and without proper authorisation during the periods 2008 to 2010;
 - 2. A PRASA Board member, Mr Vusi Twala, was improperly awarded a tender by **Intersite**, a subsidiary of PRASA, to provide CCTV cameras;
 - 3. Between the years 2008 and 2010, PRASA engaged construction companies involved in the 2010 Soccer World Cup Station Building Project, the Capex Project and renovations of existing stations without following proper procurement processes resulting in an overspending of **R2 billion** which resulted in incurring fruitless and wasteful expenditure incurred in addition to the budgeted amount of **R3 billion**;
 - 4. During the period 24 to 27 September 2009, the former Group Chief Executive Officer of PRASA (erstwhile GCEO) undertook a leisure trip in a Blue Train to Cape Town together with 10 female companions and returned in a South African

Airways (SAA) flight costing PRASA **R17 000.00**. The total cost of the trip was allegedly estimated at **R170 000.00** which constituted fruitless and wasteful expenditure;

5. PRASA acquired Umjantshi House Building in September 2009 to accommodate its Head Office staff without following proper procurement processes and without proper budget approval;
 6. During 2008/2009, the Executive Corporate Affairs Manager, Mr P Mabe, allegedly received salaries from PRASA despite having left its service and the erstwhile GCEO allegedly misled EXCO and the PRASA Board that the employee was not on PRASA's payroll.
 7. The former Chairperson of the PRASA Board, Mr Sfiso Buthelezi was alleged to be the Chief Executive Officer of Makana, an alleged subsidiary of Cadiz, a company that was allegedly providing advisory service to PRASA on the Rolling Stock Recapitalisation Project. His involvement was alleged to have constituted a conflict of interest; and
 8. The wife of Mr B Boshielo was appointed as a General Manager of Autopax without following proper recruitment processes during Mr Boshielo's tenure as a member of the PRASA Board.
- (viii) The issue regarding the alleged conflict of interest regarding the complaint levelled against Mr Sfiso Buthelezi, was specifically referred to in paragraph 8.26.3 of **Volume 1 Report**. The issue also raised widespread media attention and queries.
- (ix) From the allegations referred to above, the following issues were identified for further investigation in respect of each deferred complaint with a view to focus the investigation:

1. Did PRASA improperly implement an advance payment to a developer of the City Mall for the construction of an underground train station on the Bridge City Project without proper authorisation during the period 2008 to 2010, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
2. Did PRASA improperly award a CCTV cameras tender to Mr Vusi Twala, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
3. Did PRASA improperly engage various construction companies in respect of 2010 Soccer World Cup Projects, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
4. Did PRASA improperly procure Umjantshi House from Transnet in September 2009 by flouting supply chain management prescripts, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
5. Did PRASA improperly appoint Ms Shiela Boshielo, the wife of Mr. B Boshielo, the former member of the PRASA Board as General Manager of Autopax, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
6. Did the erstwhile GCEO improperly take a Blue Train trip to Cape Town together with ten (10) female companions during the period 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000.00 which resulted in

fruitless and wasteful expenditure, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?

7. Did PRASA improperly pay salaries to Mr P Mabe, its former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA which resulted in fruitless and wasteful expenditure and did the erstwhile GCEO misled EXCO in that regard, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
 8. Did the PRASA Board Chairperson, Mr Sifiso Buthelezi, improperly fail to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company allegedly providing advisory services to PRASA on the Rolling Stock Recapitalisation Project, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- (x) The investigation included the sourcing and analysis of corporate documents pertaining to the impugned transactions, interviews and meetings with PRASA officials and research into the regulatory framework, which included the Constitution, relevant laws, Treasury Regulations and PRASA's corporate policies.
- (xi) In arriving at the **findings**, I have been guided by the standard approach adopted by the Public Protector South Africa as an institution, which simply involves asking: What happened? What should have happened? Is there a discrepancy between what happened and what should have happened? If there is a discrepancy, does the conduct amounts to improper conduct or maladministration? If there was indeed improper conduct or maladministration, what would be the appropriate remedial action?

- (xii) As it is customary, the “what happened” enquiry is a factual question settled on the assessment of evidence and making a determination on a balance of probabilities. To arrive at a finding on what happened, the investigation, like all others, relied on oral and documentary submissions by the complainants and certain PRASA Officials. Interviews/meeting primarily to clarify evidence already gathered, were previously held with the complainants, erstwhile GCEO and his previous lawyer, Mr Makhubela, as well as the erstwhile PRASA Board members during the period of the investigations.
- (xiii) Further interviews were held with the PRASA Board chairperson, Ms Khanyisile Kweyama and her team, PRASA Officials, namely, the Head of Legal Services, Mr Fani Dingiswayo and former Company Secretary, Mr Tumi Mohube. The question regarding what should have happened on the other hand, relates to the standard that the conduct in question should have complied with.
- (xiv) In determining the standard that the erstwhile GCEO and other functionaries at PRASA should have complied with to avoid improper conduct or maladministration, I was guided, as is customary, by the Constitution, national legislation, applicable policies and guidelines, including corporate policies and related regulatory instruments. Key among corporate policies that informed the investigation was the **PRASA Procurement and Supply Chain Management Policy, 2009** (*PRASA SCM Policy*) and the Delegation of Authority framework/document. The PRASA SCM Policy approved in 2009 is very comprehensive. It commences with defining supply chain management and its purposes.
- (xv) The SCM Policy affirms and commits to uphold section 217 of the Constitution, setting the vision behind it and standards to be upheld in state procurement or Supply Chain Management (SCM) processes, which vision includes ensuring a fair, equitable, transparent, competitive and cost-effective public procurement system. The SCM Policy is based on Treasury Regulations regulating the procurement of goods and services. The policy also deals with the management of conflict of interest.

- (xvi) The investigation was also guided by Human Resources (HR) policies, to the extent that some allegations involved the appointment or promotion of an employee. In this regard section 195 of the Constitution, which sets the standard for conduct in state affairs, was also relied on.
- (xvii) As indicated in **Volume 1 Report**, during the commencement of the investigation, the allegations were brought to the attention of PRASA management through the erstwhile GCEO, the former Chairperson of the PRASA Board, Mr Sfiso Buthelezi and the then PRASA Board. The PRASA Board which was chaired by Dr Popo Molefe was engaged also by my predecessor, Adv Thuli Madonsela, during the final stage of the initial investigation in 2015. The former Acting GCEO, Mr Lindikhaya Zide was also engaged in writing regarding the provision of the outstanding information relating to the investigation and he referred the request to the Head of Legal Services at PRASA for consideration and response.
- (xviii) All information and evidence gathered during interactions with PRASA management and complainants were considered and taken into account in determining what happened, and if what happened was in line with the rules.
- (xix) Notices in terms of section 7(9)(a) of the Public Protector Act were issued against PRASA and the erstwhile GCEO, alerting them of the possibility of adverse findings being made against them.
- (xx) A discretionary notice was also previously sent to the complainants alerting them of the allegations not supported by the evidence received. In all cases, responses were solicited and the affected parties were given the opportunity to provide information and to engage through meetings.
- (xxi) Section 7(4)(a) Notices were also issued against the then Acting GCEO, Mr Lindikhaya Zide, Mr Dingiswayo and Mr Mohube. Section 7(9)(a) Notice was also issued against the Chairperson of the PRASA Board, Ms Khanyisile Kweyama and former GCEO, Mr Lucky Montana.



- (xxii) Like it happened during the initial investigation, the Public Protector investigation team had difficulty in sourcing the information from PRASA. However, PRASA management had indicated their difficulty in retrieving the relevant information, as same was not available. Despite the fact that the means used to obtain information and documents from PRASA included subpoenas issued in terms of section 7(4)(a) of the Public Protector Act, some of the documents and information requested could not be retrieved.
- (xxiii) Section 181 of the Constitution enjoins organs of state to assist, and protect the Public Protector and other institutions supporting constitutional democracy to ensure their effectiveness, among other things.
- (xxiv) After careful examination of the evidence and information obtained during the investigation and the regulatory framework setting the standard that should have been upheld by PRASA and its officials, I make the following findings:

Issues substantiated by the evidence received

1. **Regarding PRASA's alleged improper procurement of Umjantshi House from Transnet in September 2009:**
 - a) The allegation that PRASA improperly procured Umjantshi House from Transnet in 2009 without following proper procurement processes and without proper budget approval, is substantiated.
 - b) PRASA's erstwhile GCEO represented PRASA in the signing of the Agreement of Sale with Transnet on 28 September 2009, that was then signed by Transnet representative on 13 January 2010 for the sum of **R129 500 000.00**, (one hundred and twenty nine million five hundred thousand rands), including VAT),



which purported to have retrospective effect from 27 March 2009, which conduct is found to be improper.

- c) The contract amount was above the maximum value delegated to the erstwhile GCEO in terms of the PRASA Board's Delegation of Authority and the process followed is found to be flawed and therefore constitutes improper conduct.
- d) No approval of the Minister regarding the procurement of Umjantshi House, as required in terms of Paragraph 1.1 of the PRASA's Delegation of Authority, was provided by PRASA and in the absence thereof, the procurement process followed by PRASA is found to be flawed and therefore improper.
- e) The initial Payment of **R21 500 000.00** (twenty one million five hundred thousand rands) made on 27 March 2009, prior to the signing of the agreement by the erstwhile GCEO on 28 September 2009 and a representative of Transnet on 13 January 2010 constitutes advance payment in contravention of paragraph 31.1.2(b) and (c) of the Treasury Regulations and is therefore improper.
- f) The conduct of PRASA in the above regard amounts to maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

Issues not substantiated by the evidence received

2. Regarding PRASA's alleged improper payment of salaries to Mr Mabe during 2008/2009 after his resignation from PRASA allegedly amounting to fruitless and wasteful expenditure as well as the alleged misleading of the EXCO and PRASA Board by the erstwhile GCEO:

- a) No evidence was received to substantiate the allegation that there was improper payment of salaries made to PRASA's former Executive Corporate

Affairs Manager during 2008/2009 after his resignation which resulted in fruitless and wasteful expenditure, and that the erstwhile GCEO misled the EXCO and PRASA Board in that regard. The allegations are therefore unsubstantiated.

- b) However, as I was not provided with convincing evidence to disprove the allegations, I am persuaded to make a finding that the erstwhile GCEO's and/or PRASA management's failure to keep proper records or secure information and documents in this regard is substantiated and found to be improper.
- c) I also find that the failure by PRASA to keep proper records resulting in failure to provide the relevant records to the Public Protector on request amounts to maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

3. Regarding PRASA's alleged improper advancing of an upfront payment to a developer for the construction of an underground train station on the Bridge City Project:

- a) The allegation that PRASA made an improper upfront payment to a developer for the construction of an underground train station on the Bridge City Project is not substantiated by the evidence received.
- b) PRASA entered into a Bridge City development agreements with Crowie Projects on 12 December 2007 and 22 February 2010 respectively.
- c) Payment schedules obtained during the investigation revealed that total payments amounting to **R944 447 190.71** (Nine hundred and forty-four million four hundred and forty-seven thousand one hundred and ninety rands seventy

one cents) were made by PRASA to the developer, Crowie Projects, during the period between 15 September 2010 and 31 January 2013.

- d) PRASA engaged in a Bridge City Development Project undertaken by Crowie Projects in which the development of the station and concrete box was integral. No conclusive evidence could be found that PRASA made an upfront payment to the developer.

4. Regarding PRASA's alleged improper awarding of a CCTV cameras tender to Mr Vusi Twala, a board member at the time:

- a) The allegation that PRASA improperly awarded CCTV cameras tender to Mr Vusi Twala is not substantiated by the evidence received.
- b) Mr Vusi Twala indeed had some or other interest in the CCTV cameras project as reflected in the minutes of the PRASA Board which provided that PRASA had accepted that Mr Vusi Twala had fully declared his interest with regard to the CCTV cameras project.
- c) However no evidence was received during the investigation to substantiate the allegation that, Mr Vusi Twala, or his companies were improperly awarded a tender by Intersite, a subsidiary of PRASA to provide CCTV cameras service.

5. Regarding PRASA's alleged improper engagement of various construction companies in respect of the 2010 Soccer World Cup Project:

- a) The alleged improper engagement of various construction companies in respect of the 2010 Soccer World Cup Project, is not substantiated by the evidence received.

- b) The investigation on specific contracts relating to the PRASA projects were comprehensively dealt with in **Volume 1 Report**.
 - c) No specific details of which other construction companies were allegedly involved in the 2010 Soccer World Cup Project due to the irregular appointment by PRASA. I could therefore not make an adverse finding regarding the allegation concerned.
6. **Regarding the Chairperson of the PRASA Board's alleged failure to disclose and manage a conflict of interest arising from his interest in Makana, an alleged subsidiary of Cadiz, a company alleged to be providing advisory service to PRASA on the Rolling Stock and Recapitalisation Project:**
- a) The allegation that the Chairperson of the PRASA Board failed to disclose and manage a conflict of interest arising from his interest in Makana, a company that was alleged to have been associated to Cadiz, a company which was alleged to be providing advisory service to PRASA on the Rolling Stock and Recapitalisation Project, is not substantiated by the evidence received.
 - b) Mr Buthelezi, former Chairperson of the PRASA Board, had disclosed his interest in Makana and Cadiz. No evidence was found that the company concerned was providing advisory services to PRASA on the Rolling Stock and Recapitalisation Programme, as alleged.
7. **Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, the wife of Mr. B Boshielo, the erstwhile member of the PRASA Board, as General Manager of Autopax:**
- a) The allegation that Ms Shiela Boshielo was improperly appointed by PRASA as General Manager of Autopax is not substantiated by the evidence received.

b) The Executive Manager Business Development was advertised in the Sunday Times newspaper dated 29 November 2009. Ms Boshielo applied and was subsequently appointed on 06 April 2010.

- c) The evidence received also shows that she was transferred from the position of Executive Manager: Business Development to the position of Senior Manager: Regional Transportation Planning and Special Projects by the Acting Group Executive: HCM, Mr Monde Mondi, on 30 March 2012 on the same terms and conditions of her employment.

8. Regarding the GCEO's alleged improper Blue Train trip to Cape Town together with ten (10) female companions during the period 24 to 27 September 2009 and returned by SAA flight at an estimated cost of R170 000 which resulted in fruitless and wasteful expenditure:

- a) The allegation that the erstwhile GCEO improperly undertook a Blue Train trip to Cape Town with ten (10) female companions during 24 to 27 September 2009 and return by SAA flight at an estimated cost **R170 000.00** which resulted in fruitless and wasteful expenditure to PRASA, is not substantiated by the evidence received.
- b) The evidence received could not corroborate the allegation of the alleged payment of **R170 000.00** by PRASA relating to the alleged trip. Which resulted in fruitless and wasteful

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



- a) The allegation that Mr Ngobeni is the erstwhile GCEO's cousin and that he transferred him without taking disciplinary action against him for the alleged appointment of a training contractor was not substantiated by the evidence received.
- b) No evidence was received to substantiate the allegation concerned.

10. General observations

Distinctive benchmarks from Volume 1 Report:

- a) *The transactions investigated and related findings revealed failure to comply with the SCM policy, particularly involving failure to test the market appropriately for competitive pricing, which culture may have cost PRASA millions in avoidable expenditure.*
- b) *There also seems to be a culture of either poor information or document management, destroying or hiding of information that could provide evidence of maladministration and other forms of improper conduct. If the pattern is not arrested it has the potential to derail the effective and efficient procurement of goods and services to support PRASA operations and consequently service delivery by this important national asset. Poor financial management also has implications for the national revenue as it may mean frequent yet preventable rescue funding.*
- c) *Regarding PRASA's failure to provide information, it must be appreciated that public accountability via administrative bodies such as the Public Protector is not accountable to Complainants but to the public that entrusts public functionaries with public power and resources. It is, accordingly, not open to public functionaries to try and win a case by withholding or hiding information.*



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

1. The Minister of Transport to:

- a) Take cognisance of the findings regarding the improper conduct and maladministration by PRASA relating to the irregularities mentioned in the report.
- b) Include in his oversight role as a government shareholder representative with regard to PRASA monitor the implementation of remedial action taken in pursuit of the findings in terms of powers conferred under section 182(1)(c) of the Constitution.

2. The Chairperson of PRASA Board to ensure that:

- a) The PRASA Board takes cognisance of the findings of maladministration and improper conduct referred to in this report.
- b) The PRASA Board evaluates the effectiveness of its internal controls and systems on the Minimum Information Security Standards (MISS) with a view to take corrective action to prevent a recurrence of the improprieties referred to in this report.
- c) All acquisition and disposal of significant assets by PRASA complies with the provisions of paragraph 1.1 (b) of the Delegation of Authority and section 54(2)(d) of the PFMA.
- d) The PRASA Delegation of Authority is reviewed to provide for the requirement of the PRASA Board's prior approval of the agreement and payment for the



acquisition or disposal of immovable property within the level of delegation of the GCEO, which is up to a R100 million (One hundred million rands).

3. The GCEO of PRASA:

- a) Evaluates the effectiveness of its internal controls and systems on the Minimum Information Security Standards (MISS) with a view to take corrective action to prevent a recurrence of the improprieties referred to in this report.
- b) **Ensure that all staff members** responsible for information security, regarding the need for proper management and care of PRASA's records are trained for the entity to comply with the provisions of the National Archives Act, 43 of 1996
- c) The acquisition and disposal of significant assets by PRASA complies with the provisions of paragraph 1.1 (b) of the Delegation of Authority and section 54(2)(d) of the PFMA.
- d) Assists the e PRASA Board in reviewing the Delegation of Authority to provide for the requirement for the PRASA Board's prior approval of the agreement and payment for the acquisition or disposal of immovable property within the level of delegation of the GCEO, which is up to a R100 million (One hundred million rands).

4. The Offices of the Chief Procurement Officer of the National Treasury and Auditor-General to:

- a) Take cognisance of the findings on the irregularities and remedial action mentioned in the report.

5. The Director of Priority Crimes Investigation (DPCI) to:

- a) To investigate and arraign officials responsible for destruction of records in violation of the National Strategic Intelligence Act 39 of 1994 and the Archives Act 43 of 1996.



REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF MALADMINISTRATION RELATING TO FINANCIAL MISMANAGEMENT CONFLICT OF INTEREST AS WELL AS TENDER AND APPOINTMENT IRREGULARITIES AGAINST THE PASSENGER RAIL AGENCY OF SOUTH AFRICA (PRASA)

1. INTRODUCTION

- 1.1 This is volume 2 of the Public Protector's report (**Volume 2 Report**) issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).
- 1.2 It is submitted to:
 - 1.2.1 The Minister of Transport, Dr Blade Nzimande;
 - 1.2.2 The Chairperson of PRASA Board; Ms Khanyisile Kweyama
 - 1.2.3 The erstwhile GCEO of PRASA, Mr Tshepo Lucky Montana;
- 1.3 Copies of the report are provided, in terms of section 8(3), to:
 - 1.3.1 Mr Craig Nte, then General Secretary of the NTM, the Complainant;
 - 1.3.2 Mr Ephraim Mphahlele, then President of the NTM, the Complainant;
 - 1.3.3 The Auditor General of South Africa, Mr Thembekile Kimi Makwetu; and
 - 1.3.4 The Acting Chief Procurement Officer: National Treasury, Mr Willie Mathebula.
- 1.4 This report relates to an investigation into the outstanding issues deferred from an earlier investigation by the Public Protector into alleged maladministration by PRASA, emanating from over thirty seven (37) complaints which involved procurement irregularities, financial mismanagement, conflict of interest and human resources mismanagement, including the victimisation of whistle blowers, investigated by the Public Protector, which were levelled primarily against the erstwhile PRASA GCEO, Mr Lucky Montana

- 1.5 The complaints were lodged by former officials of the South African Transport Workers Union (SATAWU) in 2012 who subsequently pursued the matter as the National Transport Movement (NTM).
- 1.6 PRASA, a subsidiary of the Department of Transport, is an important strategic entity of the state and its handling of public finances and procurement of goods and services has implications on the efficient and effective delivery of public transport in compliance with the principles enunciated in section 195 of the Constitution.
- 1.7 As a public transport infrastructure provider, PRASA also has implications for the South African economy at large. PRASA is a state owned enterprise with an estimated total net value of assets over **R19 billion**, and listed as a National Government Business Enterprise in terms of Schedule 3B of the Public Finance Management Act 1 of 1999 (PFMA). It has subsidiaries and divisions, namely: **PRASA Rail** and **Autopax** operating commuter services, **PRASA Tech** managing the PRASA Group strategy and **Intersite** and **PRASA Cres** managing the corporate property portfolio
- 1.8 PRASA is controlled by PRASA Board of Control (PRASA Board), chaired by a non-executive chairperson, which in terms of section 49(2) (b) of the PFMA is its Accounting Authority. Its Group Chief Executive Officer (GCEO) has delegated authority in terms of **PRASA's Powers and Authority of the PRASA Board and Delegation of Authority**.

2. THE COMPLAINT

- 2.1 A list of complaints was lodged with the Public Protector by the former Executive Committee (EXCO) of the South African Transport and Allied Workers Union (SATAWU) led by its then President, Mr Ephraim Mphahlele and General Secretary, Mr Craig Nte, during March 2012. When SATAWU inexplicably withdrew its complaints, the EXCO of the NTM, a splinter union from SATAWU, whose EXCO

members were part of the SATAWU representatives who lodged the complaints, hereinafter referred to as the Complainants, subsequently requested the Public Protector to continue with the investigation.

- 2.2 In essence, the complaints levelled against PRASA management, in particular its erstwhile GCEO, were allegations of maladministration regarding financial mismanagement, procurement irregularities, unmanaged conflict of interest, nepotism/cronyism/ and irregular appointments.
- 2.3 The Complainants earlier identified about seventeen (17) tenders/contracts to the total value exceeding **R2.8 billion** for investigation of supply chain irregularities, including non-competitive processes, cronyism, scope creep, cost overruns, overpayment and fruitless and wasteful expenditure, which were among the allegations investigated by the Public Protector between the period 2012 and 2015.
- 2.4 The issues identified for investigation were reported in volume 1 report dated 24 August 2015, issued by the Public Protector, titled ***“Derailed” (Volume 1 Report)***. However, certain allegations were identified in the report concerned and deferred for further investigation due to lack of sufficient information for the Public Protector to make informed findings.
- 2.5 An overview of the issues deferred from **Volume 1 Report** against PRASA management are dealt herein below.
- 2.5.1 The Complainants alleged that:
- 2.5.1.1 PRASA improperly incurred an upfront payment to a developer of the City Mall for the construction of an underground train station (Bridge City Project) without going on a bidding process and without proper authorisation during the periods 2008 to 2010.

- 2.5.1.2 Former PRASA Board member, Mr Vusi Twala, was irregularly awarded a tender by Intersite, a subsidiary of PRASA to provide CCTV cameras services during his term of office as board member.
- 2.5.1.3 Between the years 2008 and 2010, PRASA engaged construction companies in the 2010 Soccer World Cup Station Building Project, the Capex Project and renovation of existing stations without following proper procurement processes. An over spending of **R 2 billion** resulting in fruitless and wasteful expenditure was allegedly incurred in addition to the budgeted amount of **R 3 billion**.
- 2.5.1.4 PRASA acquired Umjantshi House Building in September 2009 to accommodate its Head Office staff without following proper procurement processes and without a proper budget approval;
- 2.5.1.5 The erstwhile GCEO or PRASA management incurred irregular and/or fruitless and wasteful expenditures relating to the following transactions:
- (a) During the period 24 to 27 September 2009, the erstwhile GCEO undertook a leisure trip in a Blue Train to Cape Town together with ten (10) female companions for free and returned in a South African Airways (SAA) flight costing PRASA **R170 000**. The total cost of the trip was allegedly an estimated **R170 000.00** which constituted fruitless and wasteful expenditure.
 - (b) During 2008/2009, the Executive Corporate Affairs Manager, Mr P Mabe, received salaries from PRASA despite having left its service and the erstwhile GCEO allegedly misled EXCO and the PRASA Board that the employee was not on PRASA's payroll.
- 2.5.1.6 The Complainants further alleged failure to disclose and manage a conflict of interest, relating to the following member of the PRASA Board as well as the wife of a former board member:

- (a) Former Chairperson of the PRASA Board, Mr Sfiso Buthelezi was the Chief Executive Officer of Makana, a subsidiary of Cadaz, a company that was providing advisory services to PRASA on the Rolling Stock Recapitalisation Project, which constitutes a conflict of interest.
- (b) The wife of Mr B Boshielo, was appointed as a General Manager of Autopax without following proper recruitment processes during Mr Boshielo's time as a PRASA Board member.

2.5.1.7 The complaints were lodged in terms of the provisions of section 182 of the Constitution and section 6(5) of the Public Protector Act.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

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

3.2 Section 182(1) of the Constitution provides:

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

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

3.3 Section 182(2) of the Constitution provides that the Public Protector has additional powers and functions prescribed by legislation.



- 3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and abuse or unjustifiable exercise of power in the conduct of state affairs.
- 3.5 Section 6(5) (a) and (b) of the Public Protector Act specifically empowers the Public Protector to investigate any maladministration in connection with the affairs of any public entity as defined in section 1 of the Public Finance Management Act, 1999 (PFMA).
- 3.6 PRASA is a schedule 3B state-owned entity and its conduct falls within the jurisdiction of the Public Protector.
- 3.7 The Public Protector Act also confers power to resolve the disputes through conciliation, mediation, negotiation or any other appropriate dispute resolution mechanism as well as to subpoena persons and information from any person in public administration for the purposes of an investigation.
- 3.8 The subpoena powers were employed in respect of PRASA officials, when requests for information and documents were not being timeously met by the previous management team. Other subpoenas were also issued against the former Acting GCEO, Mr Lindikhaya Zide, the Company Secretary, Mr Tumi Mohube and Head of Legal Services of, Mr Fani Dingiswayo during November 2017.
- 3.9 Although the jurisdiction and power of the Public Protector to investigate was not disputed by any of the parties, it was challenging to get information from PRASA, thereby causing the delay in finalising the investigation. Promises for timeous submission of documents were not kept and even a request for assistance from the former PRASA Board yielded very few source documents, due to the instabilities within the entity at the time concerned, as well as the various ongoing internal investigations conducted.

3.10 The PRASA Board, under the Chairpersonship of Dr Popo Molefe, supported the Public Protector and undertook to cooperate with investigation and its outcomes and had indicated the Board's commitment in implementing the remedial actions contained in **Volume 1 Report**. The same commitment was received from the PRASA Board led by Ms Khanyisile Kweyama during our meeting held on 05 April 2019.

3.11 The Board has also begun the process of implementing measures to minimise systemic administrative deficiencies that enabled procurement irregularities within PRASA.

3.12 Regarding the exercise of my discretion in terms of section 6(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute '*special circumstances*', some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problems in state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainants and the overall impact of the investigation; whether the prejudice suffered by the complainants persists; whether my refusal to investigate perpetuates the violation of section 195 of Constitution; whether my remedial action will redress the imbalances of the past. What constitute '*special circumstances*' depends on the merits of each case.

4. THE INVESTIGATION

4.1 Methodology



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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute on alleged improper conduct or maladministration. Section 7 of the Public Protector Act gives the Public Protector the authority to conduct a preliminary investigation for the purpose of determining the merits of the complaint, allegation or information.

4.2 Approach to the investigation

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

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amounts to maladministration?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainants as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.1.5 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. In this particular case, the factual enquiry principally focused on whether or not the erstwhile GCEO/PRASA management acted improperly.

4.2.1.6 The sources of evidence principally included institutional documents such as bid documents, memorandum, minutes and copies of correspondence. *Viva voce* evidence was received from certain witnesses, mainly the complainants, PRASA management, including the erstwhile GCEO, the officials of the PRASA Board

during meetings or interviews. Evidence was evaluated and a determination made on what happened based on a balance of probabilities.

- 4.2.1.7 In the *Public Protector versus Mail and Guardian, 2011(4) SA 420 (SCA)*, the Supreme Court of Appeal (SCA) made it clear that it is the Public Protector's duty to actively search for the truth and not to wait for parties to provide all of the evidence as judicial officers do.
- 4.2.1.8 However, the Public Protector was hampered in its exercise by the unavailability of certain documents during the investigation, which were apparently removed or destroyed, as well as the lack of resources to use the Public Protector's powers of search and seizure in terms of section 7A of the Public Protector Act, due to the vast location of documents, and as PRASA and the National Treasury were also involved in further investigations pursuant to the remedial actions taken in the **Volume 1 Report**.
- 4.2.1.9 The enquiry regarding what should have happened, focused on the law or rules that regulate the standard that should have been complied with by PRASA management to prevent maladministration and prejudice. In this case, key reliance was placed on PRASA's comprehensive Supply Chain Management Policy of 2009 (**PRASA SCM Policy**), in addition to national laws, policies and guidelines. The Public Protector's institutional touchstones, being principles from previous reports, were also taken into account.
- 4.2.1.10 The enquiry regarding remedial or corrective action seeks to explore options for redressing the consequences of maladministration or improper conduct. Where a complainant has suffered prejudice, the idea is to place him or her as close as possible to where they would have been had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

- 4.2.1.11 In the case of conduct failure as was the case in the complaints investigated, remedial action sought to right or correct identified wrongs while addressing any systemic administrative deficiencies that could be enabling or exacerbating identified maladministration or improper conduct.
- 4.2.1.12 Jurisprudence and touchstones from previous Public Protector Reports were also considered and applied.
- 4.2.1.13 The substantive scope of the investigation focused on compliance with the law and prescripts regarding conflict of interest, the awarding of tenders, appointment of staff and service providers as well as generally accepted accountability practices for the period not exceeding 2012.
- 4.2.1.14 As a result of lack of sufficient resources and the difficulty in obtaining the requested information and evidence timeously, it was not possible to finalise the investigation earlier.
- 4.3 Having been deferred from Volume 1 Report, the allegations concerned were measured and the following issues were considered and investigated:**
- 4.3.1 Did PRASA improperly implement an advance payment to a developer of the City Mall for the construction of an underground train station in the Bridge City Project without proper authorisation during the period 2008 to 2010, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- 4.3.2 Did PRASA improperly award a CCTV cameras tender to Mr Vusi Twala, who was a board member at the relevant time, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?



- 4.3.3 Did PRASA improperly engage various construction companies in respect of 2010 Soccer World Cup projects, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- 4.3.4 Did PRASA improperly procure Umjantshi House from Transnet in September 2009, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- 4.3.5 Did PRASA improperly appoint Ms Shiela Boshielo, the wife of the then PRASA Board Member, Mr. B Boshielo, as the General Manager of Autopax, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- 4.3.6 Did PRASA's erstwhile GCEO improperly undertake a Blue Train trip to Cape Town together with 10 female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of **R170 000.00** resulting in fruitless and wasteful expenditure, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- 4.3.7 Did PRASA improperly pay a salary to Mr Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
- 4.3.8 Did PRASA former Board Chairperson, Mr Sfiso Buthelezi improperly fail to disclose and manage a conflict of interest arising from his interest in Makana, a subsidiary of Cadiz, a company which allegedly provided advisory services to PRASA on the



Rolling Stock and Recapitalisation Project, and if so, did such conduct constitute maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?

4.4 Key Sources of information

4.4.1 Documents considered

Evidence in respect of deferred issues to Volume 2 Report:

- 4.4.1.1 Memorandum of Understanding between SARCC, Crowie, Intersite Management Services Ltd, eThekweni Municipality, KwaZulu-Natal Department of Transport, Community Safety and Liaison dated 06 July 2007.
- 4.4.1.2 Approved Memorandum dated 20 September 2011 from the Group Executive Manager to Chief Procurement Officer regarding approval required on increased contract value to Crowie Projects on the Bridge City Station Development Project;
- 4.4.1.3 Development Agreement between Crowie Projects and SARCC dated 12 December 2007;
- 4.4.1.4 Development Agreement between Crowie Projects and PRASA dated 22 February 2010;
- 4.4.1.5 Addendum to the Development Agreement between Crowie Projects and Prasa dated 22 February 2010;
- 4.4.1.6 Email from Ms Luyanda Gantsho to Mr Sydney Khuzwayo and Mr Thabo Mashea dated 06 August 2010;
- 4.4.1.7 Email from Kevin McGill to Mr Pettersen dated 20 July 2011; and
- 4.4.1.8 Email from Dries Van Der Walt to Kevin McGill dated 30 September 2011;



- 4.4.1.9 Tender Adjudication and Evaluation Report;
- 4.4.1.10 Undated copy of Manager's disclosure of interest, other directorship and interest in contracts questionnaire form by Mr Vusi Twala;
- 4.4.1.11 Copy of the minutes of the Board of Control dated 01 December 2008.
- 4.4.1.12 An account payment schedule stamped paid 23 February 2010 signed by erstwhile GCEO on 10 February 2010 reflecting a payment of R61 560 000;
- 4.4.1.13 The payment history in respect of payment to Transnet stamp dated 23 February 2010;
- 4.4.1.14 A copy of the budget for 2008/9, 2009/10 and 2010/11;
- 4.4.1.15 Financial statements for PRASA for the year 2008/9, 2009/10 and 2010/11 indicating actual capital expenditure;
- 4.4.1.16 Letter of appointment from the Minister of Transport to Mr Boshielo dated 01 October 2006;
- 4.4.1.17 Application letter dated 30 November 2009;
- 4.4.1.18 Autopax employee personal particulars form dated 06 May 2010;
- 4.4.1.19 Advertisement in Sunday Times dated 29 November 2009;
- 4.4.1.20 Email correspondence dated 30 November 2009 from Ms Boshielo to recruitment@apv.co.za ;

- 4.4.1.21 Letter of appointment dated 15 April 2010 to Ms Boshielo;
- 4.4.1.22 Undated declaration of interest form from Mr Sfiso Buthelezi;
- 4.4.1.23 Letter from the Minister of Transport to Mr Sfiso Buthelezi dated 08 May 2011;
- 4.4.1.24 Affidavit from the South African Airways.

4.5 Meetings and Interviews conducted

- 4.5.1 Meetings were held with Mr Lucky Makhubela of Makhubela Attorneys on 06 February 2013; 13 March 2013; and 21 and 22 May 2015;
- 4.5.2 Meetings were held with Mr Lindikhaya Zide, Company Secretary of PRASA on 06 February 2013 and 01 August 2013;
- 4.5.3 Meetings were held between the Public Protector team and the erstwhile CGEO on 01 August 2013 and 21 and 22 May 2015;
- 4.5.4 A meeting was held between the Public Protector team and Mr Sfiso Buthelezi, then Chairperson of the PRASA Board on 01 August 2013;
- 4.5.5 Meetings were held with former senior managers of PRASA during the period 2012 and 2014;
- 4.5.6 Numerous meetings were held with the Complainants between 2012 and 2015 including on the following date: 10 May 2013; 14 May 2013; 12 July 2013; 02 August 2013; 23 August 2013; 28 January 2014 and 04 May 2015;
- 4.5.7 Interviews were held with former CEO of PRASA CRES on 26 July 2013; 30 May 2014 and 25 July 2014;



4.5.8 A Meeting with officials of the AGSA on 25 June 2015;

4.5.9 A Meeting between Public Protector and former Chairperson of the PRASA Board, Mr Popo Molefe and team was held on 30 June 2015;

4.6 Correspondence sent and received

4.6.1 Letter dated 06 July 2012 from the Public Protector to Mr Craig Nte confirming that a preliminary investigation would be conducted;

4.6.2 Letter dated 07 November 2012 from the Public Protector to erstwhile GCEO regarding investigation on the numerous allegations;

4.6.3 E-mail correspondence dated 09 November 2012 from the Public Protector to erstwhile GCEO concerning allegations against PRASA;

4.6.4 A letter correspondence dated 13 November 2012 from erstwhile GCEO to the Public Protector, first response to the Public Protector regarding investigation on the numerous allegations;

4.6.5 E-mail correspondence dated 25 January 2013 from Makhubela Attorneys to the Public Protector acknowledging the delays;

4.6.6 Letter dated 12 February 2013 from Makhubela Attorneys to the Public Protector regarding Deloitte's report and legal proceedings against SATAWU and Mr Mphahlele;

4.6.7 Letter dated 14 February 2013 from the Public Protector to Makhubela Attorneys regarding submission by PRASA;



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- 4.6.8 E-mail correspondence from 06 December 2012 to 05 February 2013 between Makhubela Attorney and the Public Protector concerning Investigation by the Public Prosecutor against PRASA;
- 4.6.9 E-mail correspondence between the Public Protector and Makhubela Attorneys from 05 February 2013 to 11 February 2013 concerning investigation against PRASA;
- 4.6.10 E-mail correspondence from 06 December 2012 to 25 January 2013 between Makhubela Attorney and the Public Protector concerning investigation against PRASA;
- 4.6.11 E-mail correspondence dated 06 February 2013 from the Public Protector to Mr Craig Nte concerning PRASA investigation;
- 4.6.12 Letter dated 18 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA and erstwhile GCEO;
- 4.6.13 E-mail correspondence dated 18 February 2013 and 19 February 2013 between Makhubela Attorneys and the Public Protector concerning PRASA;
- 4.6.14 Letter dated 18 February 2013 from Makhubela Attorneys to the Public Protector regarding PRASA;
- 4.6.15 E-mail correspondence dated 19 February 2013 from Mr Mthethwa to the Public Protector regarding PRASA;
- 4.6.16 Letter correspondence dated 20 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;



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- 4.6.17 E-mail correspondence dated 20 February 2013 and 21 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;
- 4.6.18 E-mail correspondence dated 21 February 2013 from the Public Protector to Mr Craig Nte and copied to Mr Ephraim Mphahlele concerning response to NTM memorandum of demands;
- 4.6.19 Letter correspondence dated 21 February 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;
- 4.6.20 Letter dated 21 February 2013 from the Public Protector to Mr Gasant regarding Authorisation to serve a subpoena by delivery;
- 4.6.21 Subpoena correspondence dated 26 February 2013 to erstwhile GCEO from the Public Protector;
- 4.6.22 Subpoena dated 26 February 2013 to Mr Sfiso Buthelezi from the Public Protector;
- 4.6.23 Letter dated 26 February 2013 from the Public Protector to Mr Gasant concerning authorisation to serve subpoena by delivery;
- 4.6.24 E-mail correspondence dated 28 February 2013 from the Public Protector to Mr Craig Nte and copied to Mr Ephraim Mphahlele regarding the delays by PRASA;
- 4.6.25 Return of service correspondence dated 01 March 2013 in the case between the Public Protector and Mr Sfiso Buthelezi;
- 4.6.26 Letter e dated 05 March 2013 from Makhubela Attorneys to the Public Protector concerning PRASA;
- 4.6.27 E-mail correspondence from 13 February 2013 to 06 March 2013 between Makhubela Attorneys and the Public Protector concerning PRASA;



- 4.6.28 Letter dated 15 March 2013 from erstwhile GCEO to the Public Protector regarding responses to the numerous allegations against PRASA;
- 4.6.29 Letter dated 15 March 2013 to the Public Protector from Makhubela Attorneys regarding the numerous allegations against PRASA;
- 4.6.30 Letter dated 26 March 2013 from the Public Protector to Mr Sfiso Buthelezi concerning subpoena issued against him;
- 4.6.31 Letter dated 26 March 2013 from the Public Protector to Erstwhile GCEO concerning subpoena issued against him;
- 4.6.32 Letter dated 04 April 2013 from erstwhile GCEO to the Public Protector concerning; subpoena issued on 26 February 2013;
- 4.6.33 A Letter dated 26 June 2015 to the Chairperson of the PRASA Board from the Public Protector
- 4.6.34 A Letter dated 01 July 2015; to erstwhile GCEO from the Public Protector
- 4.6.35 Letter from the Chairperson of the PRASA Board to the Public Protector dated 02 July 2015;
- 4.6.36 Letter from the erstwhile GCEO to Public Protector received on 29 August 2013;
- 4.6.37 Letter from Erstwhile GCEO to the Public Protector dated 13 July 2015;
- 4.6.38 Minutes of the SARCC Audit and Risk Management Committee Meeting dated 19 November 2008;
- 4.6.39 Minutes of the Meeting of the PRASA Board of Control of SARCC dated 01 December 2008;



- 4.6.40 Minutes of the PRASA Board of Control SARCC Audit and Risk Management Committee Meeting dated 05 February 2009;
- 4.6.41 Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 14 May 2009;
- 4.6.42 Minutes of the Meeting of the PRASA Board of Control dated 21 May 2009;
- 4.6.43 Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 23 July 2009;
- 4.6.44 Minutes of the Meeting of the PRASA Board of Control dated 30 July 2009;
- 4.6.45 Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 18 November 2009;
- 4.6.46 Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 30 November 2009;
- 4.6.47 Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 23 February 2010;
- 4.6.48 Minutes of the PRASA Board of Control Audit and Risk Management Committee Meeting dated 11 May 2010; and
- 4.6.49 Minutes of the Meeting of the PRASA Board of Control dated 05 August 2010.

Notices issued in terms of section 7(4)(a) of the Public Protector Act, 1994, to:

- 4.6.50 Erstwhile GCEO dated 09 June 2013 and 06 February 2015;



- 4.6.51 Mr Lindikhaya Zide dated 23 October 2017;
- 4.6.52 Mr Tumi Mohube dated 23 October 2017; and
- 4.6.53 Mr Fani Dingiswayo dated 23 October 2017.

Responses received to notices issued in terms of section 7(4)(a) of the Public Protector Act, 1994, from:

- 4.6.54 The erstwhile GCEO of PRASA, dated 05 June 2015; and
- 4.6.55 Response received from Mr Fani Dingiswayo, Head of Legal Services of PRASA, dated 30 November 2017.

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

- 4.6.56 Notice in terms of section 7(9)(a) dated 04 February 2019, addressed to the erstwhile GCEO's Attorney of record, Messrs Victor Nkhwashu Attorneys at the last known email address: 'victor@vnainc.co.za'.
- 4.6.57 Notice in terms of section 7(9)(a) of the Public Protector Act, dated 04 February 2019, addressed to the Chairperson of the PRASA Board, Ms Khanyisile Kweyama.

Responses to Notice in terms of section 7(9)(a) of the Public Protector Act

- 4.6.58 Response received from the Chairperson of the PRASA Board, Ms Khanyisile Kweyama to Public Protector, dated 22 March 2019.

4.7 Websites consulted

- 4.7.1 <http://www.whoswho.co.za> (April 2015);
- 4.7.2 <http://www.cipc.co.za> (May 2015);



4.7.3 <http://www.saflii.org.za> (15 July 2015); and

4.7.4 <http://www.treasury.gov.za> (April and May 2015)

4.8 Legislation and other prescripts

4.8.1 Acts

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

4.8.1.2 The Public Protector Act, 1994;

4.8.1.3 The Labour Relations Act, 1995;

4.8.1.4 The Public Finance Management Act, 1999; and

4.8.1.5 The Preferential Procurement Policy Framework Act, 2000.

4.8.2 Regulations

4.8.2.1 National Treasury Regulations, 2005 issued in terms of the PFMA.

4.8.3 Policies

4.8.3.1 The Supply Chain Management Policy of PRASA, dated February 2009, and

4.8.3.2 HR Policies of PRASA.

4.8.4 National Guidelines

4.8.4.1 National Treasury SCM Guidelines issued in February 2004.

4.8.5 Case law



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

4.8.5.2 Khumalo and Another v Member of the Executive Council for Education: Kwa-Zulu Natal (CCT 10/13) [2013] ZACC 49

4.8.6 Touch stones from previous Public Protector Reports

4.8.6.1 *"Against the Rules Too"*, Report No.33 of 2010/2011 (Volume 2); and

4.8.6.2 "GNS", Report No. 20 of 2010/2011.

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

5.1 EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

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

Common cause

5.1.1.1 It is common cause that PRASA was involved in the Bridge City Urban Renewal Project. This was confirmed in PRASA's response received on 29 August 2013 and was further confirmed by the erstwhile GCEO in his response dated 5 June 2015 to the Public Protector's Section 7(9)(a) Notice issued in terms of the Public Protector Act. The erstwhile GCEO informed the investigation team that PRASA invested over **R1.2 billion** in the project which included construction of station box for **R100**



million which was successfully completed in 2009, state of the art underground rail station completed in 2011 at the cost of **R150 million** and the laying of rail line between Bridge City and Duff's Road costing over **R640 million**.

Issues in dispute

- 5.1.1.2 What I had to determine was whether PRASA management made an irregular advance payment to a developer and received no value for it, thereby resulting in fruitless and wasteful expenditure.
- 5.1.1.3 In his response received on 29 August 2013, the erstwhile GCEO repeated his response in terms of section 7(9)(a) of the Public Protector Act, and confirmed that PRASA was a partner in the Bridge City Urban Renewal Project conceived and executed as a Public Private Partnership Project, but denied PRASA's incurring or making of any advance payment in that regard.
- 5.1.1.4 A Development Agreement entered into on 12 December 2007 between Crowie Projects (the developer) and SARCC (PRASA's predecessor), as well as the Development Agreement entered into on 22 February 2010 between PRASA and the same developer, do not have any clause providing for advance payments.
- 5.1.1.5 A response from PRASA management which was received on 29 August 2013 regarding this particular allegation was that:
- a) PRASA was centrally involved in the Bridge City Project which was located in the Ink area (Inanda, Ntuzuma and Kwa-Mashu) at eThekweni. The project was originally conceptualised late in the 1980s as the Inanda Rail Line but later renamed as the Bridge City Project.
 - b) Crowie Projects purchased the land from its previous owners, Effingham Joint Venture, owned by the City of eThekweni and Tongaat Hullet Development.

The City of eThekweni entered into a partnership agreement with Crowie Projects to undertake the development of the land.

- c) The land was earmarked for a mixed development of various structures, namely, a mall with an office block, a magistrates' court, a police station, a provincial hospital, a taxi rank, and a train station.
- d) A Memorandum of Understanding for the Bridge City Urban Renewal Project was entered into between the eThekweni Municipality, the KZN Department of Transport, Community Safety and Liaison, Crowie Projects (Pty) Ltd, the SARCC Limited and Intersite Property Management Services (Pty) Ltd.
- e) PRASA was investing over **R1.2 billion** in the project, broken down as follows: the construction of a station box for **R100 million** (one hundred million rands). The station box was successfully completed in 2009. There was also an underground rail station completed in 2011 at a cost of **R150 million** (one hundred and fifty million rands) and the laying of a rail line between Bridge City and Duff's Road costing **R640 million** (six hundred and forty million rands). The development of the station and concrete box was an integral part of the tender. The construction of the railway part of the development could not be taken out of the tender, however, the construction of the railway lines was taken out of the public tender.
- f) The tender for the rail line to link Bridge City Development with the existing line on Duffs Road was advertised in the media and closed on 14/02/2011 (HO/INF/300/2010). Twenty tenders were received including the ones from the main contractors and specialist signalling, Overhead Head Traction Electricity and Perway contractors.
- g) A consortium led by Grinaker LTA was awarded the tender to the value of **R640 424 834.70** (six hundred and forty million four hundred and twenty-four

thousand eight hundred and thirty-four rands and seventy cents). The appointment of Grinaker LTA, was approved by the PRASA Board in February 2011.

h) PRASA maintained that the allegation was false.

5.1.1.6 PRASA in support of their response provided the relevant supply chain management records and agreements entered into with the service provider.

5.1.1.7 On 6 July 2007 the Crowie Projects, SARCC, Intersite Property Management Services, eThekweni Municipality and KZN Department of transport, Community Safety & Liaison concluded a Memorandum of Understanding for the Bridge City Urban Renewal Project.

5.1.1.8 Section 5 of the Memorandum of Understanding deals with objectives of the agreement and states as follows:

"The purpose of this Agreement is to facilitate a partnership venture between IPMS on behalf of the SARCC and CP in the development of a parcel of land, adjacent to Phoenix Industrial Park, near Kwa-Mashu Highway in Durban, known as the Bridge City Urban Renewal Project for rail related infrastructure and commercial exploitation purposes ("the project").

5.1.1.9 On 18 December 2007 Crowie and SARCC concluded a Development Agreement in which agreement Crowie, as a developer, was to procure the construction of the Void on the ground floor of the Shopping Centre at the cost of **R107, 000, 000.00** (one hundred and seven million rands) payable by the SARCC, less an amount of **R20 million** (twenty million rands) inclusive of VAT payable by the developer.

5.1.1.10 Section 4 of the Development Agreement deals with the issue of payment and states as follows:

“4.1 The Developer has undertaken to bear R20 million inclusive of VAT of the costs of construction of the Void.

4.2 The Contract Price, less the R20 million referred to in clause 4.1 is payable in terms of clause 4.3, against production of progress payment certificates presented to SARCC for payment by the Developer from time to time, which progress payment certificate will:

4.2.1 be issued by the Developer; ...

4.7 As security for payment of SARCC’s contribution towards the contract Price, SARCC must, within 3 days from the signature Date, pay the sum of R30 million (“the security payment”) into the trust account of the Developer’s attorneys, Shepstone & Wylie of 35 Aliwal Street Durban (“Shepstone & Wylie”).”

5.1.1.11 I have noted another Development Agreement (First Addendum to Development Agreement) that was concluded between Crowie Projects and PRASA on 22 February 2010, after the successful completion of the construction of the Void to house a Railway Station as per the Development Agreement dated 18 December 2007.

5.1.1.12 According to the Development Agreement dated 22 February 2010, PRASA extended the scope of agreement with Crowie Projects and re-appointed them to procure the construction of the extended works, the railway station, on a turnkey basis at the estimated amount of **R110, 000 000.00** (one hundred and ten million rands) payable by PRASA, subject to adjustment and re-measurement in terms of the bill of quantities exclusive of the Turnkey Development Management Fee.

5.1.1.13 The Development Agreement dated 22 February 2010, provides the following:

“3.1.1 procure the construction of the extended works, being the Railway Station, on a turnkey basis, for the Contract Price which will be subject to adjustment and re-measurement (sic) in terms of this Addendum, the Agreement and the bill of quantities, whereby the Developer will be responsible for the co-ordination, execution and completion of the Works, save for the design thereof”

5.1.1.14 According to the Development Agreement dated 22 February 2010, the “Contract Price” is definite as *“subject to revision in terms of this Addendum, any adjustment following any variations contemplated in clause 9 of the Agreement, and re-measurement (sic) in terms of the bill of quantities, R110, 000, 000.00 (excluding VAT), being the estimated price payable by PRASA for that part of the construed Railway Station comprising the concourse, platforms and ablutions, excluding the Turnkey Development Management Fee referred to in clause 11”*.

5.1.1.15 The Contract Price excluded the Turnkey Development Management Fee, which fee was payable to the Developer by PRASA and was payable in terms of clause 11 of the Development Agreement. Clause 11 dealt with Turnkey Development Management Fee and provides as follows:

“11.1 In addition to the Contract Price, PRASA shall, as consideration for the services to be rendered by the Developer to PRASA under clause 2.2.13 of the Agreement, pay to the Developer a Turnkey Development Management Fee equal to 14.85% (fourteen point eight five per cent) of the Contract Price, excluding VAT, provided that such Turnkey Development Management Fee shall not exceed the sum of R16 335 000.00 (sixteen million three hundred and thirty five thousand Rands)”.

5.1.1.16 An e-mail dated 16 August 2010, from Ms Luyanda Gantsho to Mr Sidney Khuzwayo and Mr Thabo Mashea, states the following:

- “1. Start Date: 6 April 2010 practical start date*
- 2. Completion Date : 30 April 2011*
- 3. Contract value : R112 720 002.84 (excl. VAT)*
- 4. Project number : DN1809*
- 5. Project Scope : to Develop Station Building and Infrastructure*
 - a. Concourse- station facilities*



b. Platforms

c. Ablution

Sidney has the relevant information in terms of the agreement in place. I hope this will help and facilitate a speedy processing of this payment while the final contract is being finalised."

5.1.1.17 I have noted various e-mail correspondences concerning an outstanding payment to Focus Project Management (FPM) for the provision of professional services as well as supervision and construction monitoring. There was a suggestion from the emails that payments were made to FPM without a proper contract with PRASA.

5.1.1.18 An e-mail correspondence dated 15 July 2011 from Mr Dries van der Walt, a Group Executive in the Strategic Asset Development from PRASA, to Mr Fried Pietersen (Mr Pietersen) an employee of Crowie Projects regarding the Bridge City Professional Fees suggests that an amount of **R3 299 177.14** (three million two hundred and ninety-nine thousand one hundred and seventy-seven rands and fourteen cents) exclusive of VAT was owed to FPM. The email correspondence states as follows:

"1) We have the totals of the attached Professional Fee Certificate as follows:

- a. Station= R3, 299, 177.14 excl. VAT – for some supervision and monitoring on station project in the meantime due to urgency of construction started, i.e. before Crowie took over the supervision and monitoring as part of the Development Agreement for the station.*
- b. Rail Link= R12, 731, 462.06 excl. VAT- for additional design work relating to the Rail Link.*
- c. Total= R16, 030, 639.20 excl. VAT".*

5.1.1.19 A subsequent email correspondence to the aforementioned dated 20 July 2011 from Mr Kevin McGill, an FPM employee, to Mr Pietersen states that:

"The professional team consortium won a competitive bid to undertake the "Design Phase" of the project.

- The team was appointed by PRASA (letter issued Nov 2008), and as has correctly been pointed out, no contract was ever concluded. We have sent numerous copies of draft contracts to PRASA and have noted in all meetings and project reports that the outstanding contract was an issue. Be that as it may, the professional team continued work on the project as fees were paid regularly by PRASA.*
- A construction contract was concluded between PRASA and Crowie Projects to complete the works within the station scope. The contract between PRASA and Crowie was not an implementation Agreement and Crowie therefore did not manage the professional team during the station building contract. The professional team had a traditional structure in their relationship with PRASA. The understanding with PRASA was that the full contract including Station implementation would be concluded in due course."*
- The station construction commenced in April 2010 and by June 2011 we were experiencing increasing pressure from all consortium partners to continue working without a contract and without certainty that the implementation phase fee would be finalised and paid by PRASA."*

The payment schedules

5.1.1.20 The payment schedule obtained during the investigation reveals the payment record in respect of the Crowie Projects indicating a total amount of **R 944 447 190.71** (Nine hundred and forty-four million four hundred and forty-seven thousand one hundred and ninety rands seventy-one cents) made between the period 15 September 2010 and 31 January 2013.

PRASA SAP Records

5.1.1.21 The validity period is indicated as starting date of 06 April 2010 and end date of 31 August 2010, while the agreement date for contract no. 4600001782 with Crowie Projects is indicated as 17 August 2010.

5.1.1.22 PRASA SAP records: Display Contract: Item Overview indicates the following details:

(a) **R 112 720 002.84:** Item 10

(b) **R 198 500 803.24:** Item 20

5.1.1.23 However, the SAP Release Order Document indicates value released (payment) for item 20 as follows:

PO	Item	Order date	Order qty Un	PO value	Curr
4500004328	000010	14/09/2010	1 Au	2 743 695.28	ZAR
4500004339	000010	15/09/2010	1 Au	16 006 926.83	ZAR
4500004752	000010	08/10/2010	1 Au	18 555 106.26	ZAR
4500005811	000010	22/11/2010	1 Au	40 362 040.05	ZAR
4500006085	000010	10/12/2010	1 Au	20 469 459.92	ZAR
4500006670	000010	11/02/2011	1 Au	155 305.62	ZAR
4500006729	000010	14/02/2010	1 Au	21 600 674.50	ZAR
4500009076	000010	17/08/2011	1 Au	68 809 497.59	ZAR
Value released to date				180 702 606.85	ZAR

Applicable legal framework

National Treasury Regulations of March 2005



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

Conclusion

5.1.1.25 The information received does not support the allegation that PRASA management made an irregular advance payment to a developer and received no value for it, thereby resulting in fruitless and wasteful expenditure.

5.1.2 **Regarding the alleged irregular awarding of CCTV cameras tender to Mr. Vusi Twala, then Board Member:**

Common Cause

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

Issues in Dispute

5.1.2.2 The issue for my determination was whether Mr Vusi Twala, a board member at the time, had an undisclosed interest in the company which was allegedly awarded the tender by PRASA and whether he and/or the PRASA Board had failed to manage a consequent conflict of interest arising from him having to look after his financial interests in the said company, while honouring his fiduciary duties as a board member of PRASA.

5.1.2.3 Despite evidence to the contrary, the erstwhile GCEO, in his response received on 29 August 2013, submitted that at no stage did PRASA award a tender for the provision of CCTV cameras to Mr Vusi Twala. In his response to the Section 7(9)(a)

Notice, the erstwhile GCEO also reiterated that Intersite had never at any stage whatsoever awarded a contract for the installation of CCTV cameras to Mr Vusi Twala.

- 5.1.2.4 While the erstwhile GCEO did not confirm that Mr Vusi Twala had an interest in the CCTV cameras tender, one of the documents provided with his submission, is a copy of minutes of the PRASA Board meeting held on 1 December 2008 reflecting Mr Vusi Twala's disclosure of interest in the CCTV cameras tender.
- 5.1.2.5 Notably, the minutes in question include a recording that the PRASA Board had accepted that Mr Vusi Twala had fully declared his interest with regard to the CCTV cameras tender.
- 5.1.2.6 There is also a contract questionnaire form completed by Mr Vusi Twala, declaring that he was a director at several companies and a member in two (2) close corporations.
- 5.1.2.7 During further engagements with PRASA regarding the subject matter, the Head of PRASA Legal Services, Mr Fani Dingiswayo stated in his response to the Public Protector, dated 30 November 2017, that after interviewing Mr Tumi Mohube, PRASA Company Secretary, PRASA could confirm that Mr Twala's company responded to the tender, which was never awarded. He further confirmed that the matter regarding his interest was discussed at board level but the tender was not awarded to him.
- 5.1.2.8 The investigation team obtained and reviewed an undated copy of Manager's Disclosure of Interest and other directorship and interest in contracts questionnaire form by Mr Vusi Twala. It was noted that he declared that he was a Director in the following companies:
- a) Khula Finance Enterprises;
 - b) Prentec Isibonelo; and



c) Tunnel Engineering.

5.1.2.9 Evidence obtained during the investigations further indicated that Mr Vusi Twala was a member in the following close corporations:

- a) Mada Projects CC;
- b) Leolo Money Market CC.

5.1.2.10 Furthermore, it was noted that the PRASA questionnaire regarding the disclosure of interest read as follows: *"Have you or will you be benefiting materially, either directly or indirectly, from any contract entered into with the corporation or any other contract related thereto? I am a director in Tunnel Engineering and I get a salary from it."*

5.1.2.11 According to the Tender Adjudication Report, tender IPMS/C/01 for the supply, delivery, installation, commissioning of CCTV access control and fire protection of September 2009, Siyangena Technologies was awarded the tender. Three companies, SV Solutions, Siyangena Technologies and KGT Enterprises made submissions in the relevant tender.

Applicable legal framework

5.1.2.12 **Paragraph 8 of PRASA SCM Policy states the following:**

"If an SCM personnel or other PRASA employee or other role player, or any close family member. Partner or associate of such official or other role player: (a) Has any private or business interest in any contract to be rewarded; (b) Conduct activities that could reflect negatively on the reputation of the Agency and its personnel; (c) Participating in any activity that might lead to the disclosure to the Agency's proprietary information or; (d) Conduct outside work for suppliers; That staff member or other role player must:- (i) Disclose that interest to the GCEO; and (ii)

Withdraw from participating in any manner whatsoever in the process relating to that contract."

Conclusion

5.1.2.13 I have not obtained any information corroborating the allegation that Mr Twala was awarded the tender of the CCTV cameras. PRASA had stated that there were no records pertaining to the awarding of the tender to Mr Twala.

5.1.2.14 The Resolution BOC 01-01/12/2008 of the PRASA Board dated 26 February 2009 provides that Mr Twala had made a proper disclosure of his interest in the CCTV Project. The Minutes of the Board meeting indicates that the company secretary had reported that the matter of Mr Twala's interest dated back to 2005 and needed to be finalised.

5.1.2.15 While, the only logical conclusion I could make on the evidence received was that Mr Vusi Twala indeed had some interest in the CCTV cameras tender, I could not make a determination, corroborating the allegation regarding the nature of such interest and whether or not the alleged conflict of interest had been managed as prescribed in the SCM Policy, as no evidence was received confirming that Mr Twala was awarded a CCTV cameras tender, as alleged.

5.1.3 Regarding PRASA's alleged improper engagement of various construction companies in respect of the 2010 Soccer World Cup Projects:

Common cause

5.1.3.1 It is common cause that during 2010, PRASA engaged various companies in respect of the FIFA World Cup Projects.

Issues in dispute

- 5.1.3.2 The issue for my determination was whether PRASA did not follow the procedures set out in its SCM Policy when procuring the alleged services of the said companies and if any fruitless or wasteful expenditure was incurred in that regard.
- 5.1.3.3 PRASA, in its responses dated 29 August 2013 and 06 May 2015 to the Section 7(9)(a) Notice, denied the allegation that the awarding of tenders to the companies for the 2010 FIFA World Cup Projects was irregular.
- 5.1.3.4 The erstwhile GCEO maintained that all projects undertaken in preparation for the 2010 Soccer World Cup followed an open, transparent, fair and competitive bidding process and that in all the contracts that were awarded to the relevant contractors, such projects were properly advertised as per the requirements of the PRASA SCM Policy.
- 5.1.3.5 PRASA went out on a tender under the banner of 2010 Turn-Around Strategy in October 2007, which attracted 258 suppliers, and 104 bids covering various technical disciplines for which briefing sessions were held in all of PRASA's operational centers that were subjected to an evaluation process.
- 5.1.3.6 An email received by the investigation team from Mr J Sindane, PRASA's Senior Manager Projects: Intersite, addressed to Siyangena Technologies, dated 15 September 2009, titled: 2010 World Cup – Nasrec Station: Letter of Appointment for Supply and Installation of CCTV, Access Control and Fire Protection, provides that Siyangena Technologies was appointed as a subcontractor for the amount of **R4, 509 928.68** (four million five hundred and nine thousand nine hundred and twenty-eight rands sixty eight cents).
- 5.1.3.7 The issue relating to Siyangena Technologies was comprehensively dealt with in **Volume 1 Report**. The Public Protector earlier found that the amount of **R1, 95 billion** was expended in the irregular extension of the contract concerned.

- 5.1.3.8 I have also not discovered any evidence during the course of the investigation, which proves the allegation that various construction companies were improperly appointed for the 2010 Soccer World Cup Project.
- 5.1.3.9 Specific allegations in which various companies were allegedly appointed without following procurement process were dealt with comprehensively in the **Volume 1 Report**. However, the appointment of certain companies was deferred to the latter investigation, forming part of this report.
- 5.1.3.10 It could therefore not be determined whether or not due procurement process was followed in the appointment of the alleged unidentified service providers. Accordingly it cannot be determined if there was any irregular and/or fruitless and wasteful expenditure incurred relating to this allegation, except the findings made in the **Volume 1 Report**.
- 5.1.3.11 Evidence as indicated above reflects that the budgeted capital expenditure of PRASA for the period 2008/9 and 2009/10 was exceeded by the actual expenditure, by an amount of “**R1 286 659 and R715 379**” respectively.
- 5.1.3.12 The Auditor General also indicated in PRASA's Annual Report for 2008/9, 2009/10 and 2010/11 that, the fruitless and wasteful expenditure incurred by PRASA was in respect of interest on overdue creditors accounts with reference to the 2010 Soccer World Cup Projects. This aspect was dealt with in **Volume 1 Report**.

Applicable legal framework

The Supply Chain Management Policy of PRASA, February 2009:

- 5.1.3.13 PRASA Supply Management Policy, 2009 (SCM Policy) provides in paragraph 11.3.2 that “*a competitive bidding process is applicable when the estimated total*

value of the requirement is more than R350 million. This process must be followed irrespective of the type of service or product required."

- 5.1.3.14 In respect of bids below R350m, three written quotations must be obtained from the suppliers on the database. Only in the event where none of the suppliers can meet the requirements, should quotations be obtained from suppliers not on the database whereby a motivation must be lodged with the Chief Procurement Officer for approval.
- 5.1.3.15 PRASA SCM Policy provides further in paragraph 11.4.7 for the bids to be advertised in the print media or any publication if and when necessary.
- 5.1.3.16 Paragraph 11.3.1 of the PRASA SCM Policy provides that *"a request for quotation is allowed for procurement not exceeding R350 million. All requisitions above R350 million shall be submitted for the invitation of bids."*
- 5.1.3.17 Paragraph 11.3.1.1 of the PRASA SCM Policy provides that *"in respect of procurement below R350 million three written quotes should be obtained from suppliers on the database. In the event that potential suppliers are not available on the Approved Supplier Database, quotations can be obtained from any other supplier provided the authorisation has been granted as prescribed in clause 11.2.1"*.
- 5.1.3.18 Various 2010 PRASA Projects that I have had sight of relate to the Integrated Security Access Management Solutions (ISAMS), which was apparently aligned to the speed gates project, which entails the installation of speed gates, CCTV cameras, help points, passenger information display boards and fire detection systems. Siyangena Technologies was awarded the contract. The speed gates matter was dealt with in paragraph 6.1 of the Volume 1 Report.
- 5.1.3.19 The other project relates to the Bridge City Project, which is dealt with herein above relating to the appointment of the Crowie Projects.

5.1.3.20 In the absence of evidence regarding the appointment of other specific construction companies for the 2010 Soccer World Cup Project, I could not make a determination whether or not the appointments concerned were unlawful.

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

Common cause

5.1.4.1 It is common cause that Mr Sfiso Buthelezi was the Chairperson of the PRASA Board and the Chief Executive Officer of Makana, a company allegedly associated with Cadiz Holdings Ltd (Cadiz) during the relevant time of the lodgement of the complaint with the Public Protector.

Issues in dispute

5.1.4.2 The issue for my determination was whether or not Mr Buthelezi failed to disclose and manage a conflict of interest arising from Makana, associated with Cadiz, which was allegedly a service provider to PRASA.

5.1.4.3 In the responses received on 29 August 2013 and 06 May 2015, PRASA denied that Cadiz was rendering Advisory Service to PRASA on the Rolling Stock Recapitalisation Project, as alleged by the Complainants, and further denied that Mr Sfiso Buthelezi failed to disclose and manage his conflict of interest in that regard.

5.1.4.4 PRASA argued in this regard that it started the Rolling Stock Fleet Renewal Programme with the appointment of a consultancy to perform a feasibility study.

The consortium was led by KPMG, assisted by Interfleet and Edward Nathan Sonnenberg.

- 5.1.4.5 PRASA further submitted that it appointed Transactional Advisors for its new Rolling Stock Renewal Programme through a proper and transparent tender process and that Cadiz was not in any way one of the companies appointed by PRASA for the Rolling Stock Fleet Renewal Programme.
- 5.1.4.6 PRASA indicated that companies in their various capacities appointed to the Project were: Interfleet Technologies; KPMG; LETSEMA; Weber Wentzel; Ledwaba Mazwai Attorneys; Vela VKE; and Arcus Gibb.
- 5.1.4.7 PRASA argued that the allegation that Cadiz is providing advice on the new Rolling Stock and Recapitalisation Project was not only false but also dangerous as it jeopardised an important process in the upgrading of passenger rail services and the creation of job opportunities within South Africa.
- 5.1.4.8 PRASA submitted that it finally announced the Gibela Consortium as the preferred bidder for the main Rolling Stock Fleet Renewal Programme and that, for the record, the former Chairperson of the PRASA Board was a Senior Executive at Makana Investment Corporation, which is owned by the Makana Trust, which belongs to former political prisoners in South Africa.
- 5.1.4.9 Makana Trust had a stake in Cadiz Holding Ltd which was not involved in the PRASA Rolling Stock Fleet Renewal Programme.
- 5.1.4.10 In support of the contention, PRASA Management/GCEO provided the declaration of interest of Mr Sfiso Buthelezi and the letter of his appointment as PRASA Board member, dated 8 May 2011, from the former Minister of Transport, Mr S Ndebele

5.1.4.11 In terms of the “*DECLARATION OF INTEREST SUBMITTED BY N.S BUTHELEZI*”, Mr. Buthelezi’s disclosure of interest is provided as follows:

Company registration no	Name of company	Capacity	Nature and extent of interest
1997/007258/06	Cadaz Holdings		Shareholder
1997/011411/07	Makana Investment Cooperation	Director	Shareholder

Applicable legal framework

5.1.4.12 Paragraph 8 of PRASA SCM Policy states the following:

“If an SCM personnel or other PRASA employee or other role player, or any close family member, Partner or associate of such official or other role player: (a) Has any private or business interest in any contract to be rewarded; (b) Conduct activities that could reflect negatively on the reputation of the Agency and its personnel; (c) Participating in any activity that might lead to the disclosure to the Agency’s proprietary information or; (d) Conduct outside work for suppliers; That staff member or other role player must:- (i) Disclose that interest to the GCEO; and (ii) Withdraw from participating in any manner whatsoever in the process relating to that contract.”

Conclusion

5.1.4.13 I have not been provided with evidence contradicting PRASA’s assertion in the above regard and in the absence of proof that Cadiz rendered services to PRASA on the Rolling Stock Project, I am inclined to accept that although Mr Buthelezi was

not given a tender as alleged, there was proper disclosure of interest by Mr Buthelezi and that there was no conflict of interest affirmed.

5.1.5 Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, the wife of former PRASA Board Member, Mr. B Boshielo, as the General Manager of Autopax:

Common cause

5.1.5.1 It is common cause that Ms Boshielo, the wife of the erstwhile member of the PRASA Board, Mr. B Boshielo, was appointed as an Executive Manager Business Development at Autopax on 03 May 2010.

5.1.5.2 It is also common cause that at the time of the appointment of Ms Boshielo, Mr B Boshielo was a PRASA Board member.

Issues in dispute

5.1.5.3 The issue in dispute and for my determination was whether Ms Boshielo was appointed General Manager of Autopax, and if so, whether the appointment was done in line with PRASA's Recruitment and Selection Policy.

5.1.5.4 A response from PRASA received on 29 August 2013, to the Public Protector's Section 7(9)(a) Notice, regarding this particular allegation was that:

- a) Ms Boshielo was appointed at Autopax, a wholly owned subsidiary of PRASA in terms of their own recruitment processes. Ms Boshielo was in her own right an experienced Public Transport Practitioner, who was employed by the Department of Roads and Transport in Limpopo.
- b) PRASA's Recruitment Policy provides for the headhunting of suitably qualified and experienced candidates as long as this is approved by PRASA GCEO.



- c) Ms Boshielo was appointed by the PRASA Board of Autopax, a subsidiary of PRASA and her appointment was in line with the provisions of the PRASA Recruitment Policy.
- d) The allegation that the recruitment and appointment of Ms Boshielo was influenced by any member of the PRASA Board was denied.

5.1.5.5 There was no evidence received that other candidates that applied for the position disputed the veracity of the process of the appointment of Ms Boshielo, except the allegation that she was appointed while her husband was a board member, which could have influenced the relevant appointment.

5.1.5.6 No evidence was received to prove that Mr Boshielo played a role or had an influence in the appointment of Ms Boshielo to the position concerned.

5.1.5.7 However, the erstwhile GCEO, in support of his response, submitted the Job advertisement and email correspondences regarding Ms Boshielo's appointment.

5.1.5.8 The copy of the advertisement shows that the position was advertised on the Sunday Times newspaper of 29th November 2009.

5.1.5.9 According to the document titled "*Autopax Job specification*", the following information was reflected:

- Job title: Executive Manager Business Development
- Department: CEO
- Closing Date: 7 December 2009
- As per the Employment Equity Plan this position was earmarked for African or Coloured female.

5.1.5.10 According to an e-mail dated 30 November 2009 from Ms. Polly Boshielo to recruitment@apx.co.za (copied "bopapem@telkomsa.net") Ms Boshielo's application form and CV were attached and forwarded to Autopax.

- 5.1.5.11 A copy of an application letter dated 30 November 2009 from Ms Boshielo to the Executive Director: HR Autopax Passenger Services (Pty) (Ltd) titled "Application for an advertised post: Executive Manager: Business Development provided:

"I, Shela Paulina Polly Boshielo hereby apply for a post of Executive Manager: Business Development as advertised in the Sunday Times of 29th November 2009"

- 5.1.5.12 The e-mail dated 15 April 2010 from Mr. Johannes Matheko, Autopax Passenger Services (Pty) (Ltd), Executive Manager Human Resource, to pollyboshiela@yahoo.com titled Business Development Executive, provides that:

"We refer to the interview held on the 6 April 2010 and wish to inform you were successful in your application. In view of the aforesaid, Autopax will like to make you an offer for employment. Kindly find attached for your perusal and consideration."

- 5.1.5.13 A letter of appointment dated 15 April 2010 was addressed to Ms Boshielo signed by S Zamxaka (Chief Executive Officer), Autopax Passenger Services (Pty) (Ltd). The letter concerned provided that Ms Boshielo was appointed as Executive Manager: Business Development at Autopax Passenger Services (Pty) (Ltd) with effect from 3 May 2010. The acceptance letter was signed on 3 May 2010.

- 5.1.5.14 While in the initial response the GCEO maintained that Ms Boshielo was appointed through headhunting process, in response to the Public Protector's earlier provisional findings, he stated that PRASA's initial submission was made in error as Ms Boshielo was appointed through a recruitment and selection process and that she was selected from amongst other candidates.

- 5.1.5.15 However, PRASA did not provide the Public Protector with the recruitment documents relating to the other candidates who applied for the position, their scoring and recommendations for their appointment or otherwise.



5.1.5.16 The Head of Legal Services, Mr Dingiswayo stated in his response dated 30 November 2017 to the Public Protector's Notice in terms of section 7(4)(a) of the Public Protector Act, that PRASA could not retrieve the information and that officials who were involved in the recruitment process were no longer with PRASA.

5.1.5.17 I have perused and noted the contents of Ms Boshielo's personnel file, amongst others, the job advertisement and application for the position, the employment offer and the acceptance letter. There is nothing untoward regarding Ms Boshielo's appointment process and no evidence was found to sustain the allegation that her appointment was influenced because of her husband's position as a board member.

Application of the legal framework

5.1.5.18 According to the Human Resources Recruitment and Selection Policy of Metrorail dated 01 October 2007 (Metrorail Recruitment and Selection Policy), paragraph 4 provides among others that in achieving the vision and mission of Metrorail, recruitment and selection must adhere to the principle of ensuring that all employment practices are fair, equitable and transparent avoiding all forms of favouritism and nepotism.

5.1.5.19 Paragraph 9 (Head Hunting) of the PRASA Recruitment and Selection Policy dated 1 December 2008 states that:

"The Group Chief Executive Officer has the authority to head hunt, and/or mandate the Human Resource Department to head hunt candidates with appropriate skills knowledge and experience necessary to meet the requirements of the business"

Conclusion

5.1.5.20 On the information provided, I am persuaded to accept that the recruitment process was followed and no evidence of improper influence by any board member was



received. I could also not find any conflict of interest in her appointment due to her husband's membership of the PRASA Board at the relevant time.

5.1.5.21 I have also noted a letter of offer and acceptance of employment of Ms Boshielo as Senior Manager: Regional Transportation Planning and Special Projects from the former Acting Group Executive: HRM, Mr Monde Mondli dated 30 March 2012. The letter concerned provided that the other terms and conditions of her employment remained the same. The contents reflected a lateral translation to another post and not a promotion, and can therefore not be regarded as improper recruitment.

5.1.5.22 Although the appointment of Ms Boshielo was not done through a headhunting process, paragraph 9 of the PRASA Recruitment and Selection Policy provided the GCEO or his/her delegated HRD Official to appoint candidates with appropriate skills, knowledge and experience necessary to meet the requirements of the business.

5.1.5.23 In the absence of supporting evidence relating to the alleged improper appointment of Ms Boshielo as General Manager, I cannot conclude that her appointment did not follow proper recruitment process and could not uphold the allegations.

5.1.6 **Regarding the erstwhile GCEO's alleged improper Blue Train trip to Cape Town together with ten (10) female companions during the period between 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000.00 and did such amount to fruitless and wasteful expenditure:**

Common cause

5.1.6.1 It is common cause that the erstwhile GCEO undertook a Blue Train trip to Cape Town.

Issues in dispute

- 5.1.6.2 The issue for my determination was whether the erstwhile GCEO improperly undertook a Blue Train trip with ten female companions to Cape Town at PRASA's expense and returned by SAA flight at an estimated cost of **R170 000.00** resulting in fruitless and wasteful expenditure.
- 5.1.6.3 In his response received on 29 August 2013, the erstwhile GCEO stated, regarding this particular allegation that three (3) PRASA Executives embarked on an operation inspection of the Blue Train for the purpose of assessing its operations on 25 April 2011. This date does not correlate with the date of 27 September 2009 alleged by the complainants and therefore the response in this regard is not relevant to the point in issue. No evidence with probative value relating to PRASA's contention was received.
- 5.1.6.4 Regarding trip entries and recordings, the erstwhile GCEO argued that PRASA used an electronic diary and at the commencement of every calendar year, these electronic diaries automatically delete entries of the preceding years and therefore could not provide same, as the information was already deleted.

Evidence obtained from SAA and the Complainants

- 5.1.6.5 The evidence reveals that the trip of September 2009 was arranged through the office of the former GCEO using PRASA's official travel agency.
- 5.1.6.6 However, the evidence obtained from SAA indicates that the travelling costs in respect of the persons referred to by the complainants, was paid for in cash and not by PRASA, as alleged.
- 5.1.6.7 The complainants provided photographs taken between 24 and 27 September 2009. Documents received from SAA and the evidence received from the Complainants suggest that the erstwhile GCEO travelled on 24 September 2009 in the same train with other 5 persons, some of the alleged companions.



- 5.1.6.8 The response from Head of Legal Services, Mr Dingiswayo, dated 30 November 2017 to the Public Protector's Notice in terms of section 7(4)(a) of the Public Protector Act, is to the effect that nothing concrete could be found regarding documentary evidence pointing towards PRASA having paid for the trip and that no other information, except the train schedules was available.
- 5.1.6.9 No reliable proof of payment by PRASA regarding the relevant trip was received by the investigation team to substantiate the allegation that PRASA incurred fruitless and wasteful expenditure in that regard.

Applicable legal framework

- 5.1.6.10 Section 1 of the PFMA provides for definitions as follows:

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

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

Section 51(b)(ii) of the PFMA further provides that an Accounting Authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity.

Conclusion

- 5.1.6.11 It was concluded in **Volume 1 Report** that no sufficient information had been provided with convincing evidence to conclude that the complainants' allegation is corroborated and proved, and in the absence of any further evidence to prove that

the relevant payment was made by PRASA, I am persuaded to afford the erstwhile GCEO the benefit of doubt.

5.1.6.12 In the absence of direct evidence proving the alleged payment of the amount of **R170 000.00** by PRASA, I cannot conclude that there was fruitless and waste expenditure incurred by PRASA in the above regard. The Auditor-General had also not made such finding in his report relating to PRASA for the relevant financial year.

5.1.7 Regarding the erstwhile GCEO's alleged improper transferring of Mr Stephen Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disabilities :

Common cause facts

5.1.7.1 It is common cause that Mr Stephen Ngobeni was in the employment of PRASA during the period 2008.

Issues in dispute

5.1.7.2 Complainants alleged that the erstwhile GCEO appointed his cousin, Mr Stephen Ngobeni at PRASA. Mr Ngobeni is alleged to have irregularly appointed a Training Contractor to provide training services on the handling of People with Disabilities. He was allegedly improperly transferred by the erstwhile GCEO without disciplinary action being instituted against him.

5.1.7.3 A response from PRASA which was received on 13 March 2013 regarding this particular allegation was that:

- a) Stephen Ngobeni was appointed in the security department of Cape Metrorail in 1988. Mr Ngobeni ascended through the ranks to become head of security,

Head of Operations and was eventually the Regional Manager of Cape Metrorail.

- b) He was demoted and transferred after his handling of a labour dispute that resulted in a strike and loss of assets.
- c) Mr Ngobeni is not a cousin nor bears any relation to the erstwhile GCEO of PRASA, who joined the rail utility only in July 2006, eight years after Mr Ngobeni was appointed by Metrorail in Cape Town. Accordingly, this allegation is rejected by PRASA.

5.1.7.4 In his response received on 29 August 2013 by the investigation team, the erstwhile GCEO argued that PRASA was a 16 000 strong employee organisation and that as was normal with any business of PRASA's size, employees face disciplinary hearings that may even result in termination of employment.

5.1.7.5 The erstwhile GCEO further stated in his response dated 06 May 2015, that Mr Ngobeni was never given the responsibilities of appointing contractors and was therefore never suspended or disciplined by PRASA for appointing training contractors.

5.1.7.6 In this regard the erstwhile GCEO submitted that employees were disciplined by their immediate supervisors in accordance with the Disciplinary Code of PRASA.

5.1.7.7 However, it could be deduced from the CCMA and Labour Court records perused, that PRASA in most cases was found to have been at fault and not complying with paragraph 4.4 of PRASA's Disciplinary Code and Procedure which resulted in the CCMA overturning some of the terminations, as found in the **Volume 1 Report**.

Application of the legal framework



- 5.1.7.8 PRASA should have complied with their Disciplinary Code and Procedure, in particular paragraph 4.4 which requires a disciplinary hearing to be conducted and finalised within a period of 30 days.

Conclusion

- 5.1.7.9 No evidence was provided to contradict the submissions by PRASA in the above regard and to corroborate the allegation that the erstwhile GCEO transferred Mr Ngobeni without taking a disciplinary action against him for the alleged misconduct.
- 5.1.7.10 The issue of disciplinary actions against PRASA Executives was dealt with in detail in the **Volume 1 Report**.

5.1.8 Regarding PRASA's alleged improper procurement of Umjantshi House from Transnet in September 2009:

Common cause

- 5.1.8.1 It is common cause that PRASA moved its Head Office from the Jorissen's Place after acquiring Umjantshi House to accommodate its Head Office staff in November 2009.

Issues in dispute

- 5.1.8.2 The issue for my determination was whether or not the acquisition of Umjantshi House followed due processes as prescribed in the PRASA SCM Policy and other relevant acquisition prescripts as well as a proper budget approval.
- 5.1.8.3 The Complainants alleged that after vacating Jorissen Place, PRASA allegedly acquired Umjantshi House to accommodate its Head Office staff without following proper procurement processes and without proper budget approval.

- 5.1.8.4 PRASA, in its response received on 29 August 2013 and its subsequent response to the Public Protector's Section 7(9)(a) Notice, dated 06 May 2015, denied that it acquired Umjantshi House irregularly without following proper acquisition processes.
- 5.1.8.5 The Agreement of Sale between PRASA and Transnet, referred to herein below, provides that PRASA purchased Umjantshi House from Transnet in 2009 for an amount sum of **R129 500 000.00** (one hundred and twenty-nine million five-hundred thousand rands) (including VAT).
- 5.1.8.6 PRASA asserted in a response from its erstwhile GCEO, dated 29 August 2013 referred to herein above, regarding this particular allegation that:
- a) PRASA's predecessor, the South African Rail Commuter Corporation Ltd (SARCC), moved to Jorissen Place in Braamfontein sometime in 2007;
 - b) Since the location of Jorissen Place was viewed to be strategic, the SARCC concluded a lease agreement with Liberty Life. The most essential aspect of this lease agreement was that the SARCC acquired an option to purchase the property from Liberty Life;
 - c) The agreement was that the sale would either happen at the expiration of the lease; alternatively, during the course of the lease, should Liberty Life decide to sell the property;
 - d) When the SARCC, through Intersite, approached Liberty Life with an offer to purchase, Liberty Life indicated that they were not willing to proceed with the transaction of sale of the property concerned and as a result, the SARCC took the decision to acquire Umjantshi House with a view to house all its different businesses in one building; and

- e) PRASA disputed that there were any irregularities in the acquisition of Umjantshi House.

5.1.8.7 In a subsequent response from the erstwhile GCEO, dated 6 May 2015, to the Section 7(9)(a) Notice referred to above, PRASA stated, amongst others, that the transaction between state entities is not prohibited by law and further that a transaction of this nature between state entities who serve a similar mandate cannot be regarded as unlawful, especially in the absence of any wrongdoing or corruption, as proper governance procedures were followed by PRASA in the acquisition of Umjantshi House.

5.1.8.8 PRASA further asserted that the purchase of Umjantshi House was negotiated between the SARCC and Transnet and had submitted the Agreement of Sale entered into between PRASA and Transnet referred to herein below in detail, in support of its response.

Agreement of Sale between PRASA and Transnet, signed on 28 September 2009 and 13 January 2010 respectively:

5.1.8.9 According to the Agreement of Sale between PRASA and Transnet, PRASA purchased Umjantshi House from Transnet in 2009. The agreement concerned was signed on 28 September 2009 by the erstwhile GCEO on behalf of PRASA and by an unidentified individual on behalf of Transnet, on 13 January 2010 (Agreement of Sale).

5.1.8.10 Paragraph 2.1.4 of the Agreement of Sale states that the date of the sale, notwithstanding the date of the signature of the agreement, meant 27 March 2009, which conduct is not in line with the general practice regulating contracts in PRASA. The application of the contract had purported to have retrospective effect.

Purchase of Umjantshi House

5.1.8.11 Paragraph 4.2.1 of the Agreement of Sale further provides that the total consideration payable as the purchase price in respect of “*all properties*” is the sum of R 129 500 000 (Including VAT). A crucial issue for determination was whether a board resolution, SCM or acquisition documents and approval from the Minister of Transport (Minister) were necessary for the purchase of Umjantshi House, which except the agreement and certain payment schedules, were never made available to me. According to other provisions of the Agreement of Sale:

- (a) The purchase price for Umjantshi House is reflected as the amount of **R 108 000 000** (One hundred and eight million rands), exclusive of VAT;
- (b) The purchase price for Lab Building is reflected as the amount of **R20 000 000** (twenty million rands), exclusive of VAT; and
- (c) The purchase price for Parking Lot is reflected as the amount of **R1 500 000** (One Million Five Hundred Thousand Rands), exclusive of VAT.

5.1.8.12 According to paragraph 4.2.4 of the Agreement of Sale, the initial payment of the amount of **R21 500 000** (twenty one million five hundred thousand rands) was made on 27 March 2009 to Transnet, minus the **R806 250** (eight hundred and six thousand two hundred and fifty rands) facilitation fee in favour of Intersite. This amount is however not in line with the provision for the facilitation fee consensus made in paragraph 4.3.3 of the Agreement of Sale, which refers to the amount of **R4 050 000** (Four million and fifty thousand rands).

5.1.8.13 The actual payment of **R20 693 750** (Twenty million six hundred and ninety three thousand seven hundred and fifty rands) was therefore, accordingly, effected.

5.1.8.14 An account payment schedule signed by the erstwhile GCEO on 10 February 2010 reflects a history of payment of **R 61 560 000** (sixty-one million five hundred and

sixty thousand rands) to Transnet. A Transnet invoice dated 16 February 2010 reflects an amount of similar value of **R 61 560 000** (sixty-one million five hundred and sixty thousand rands). The same was signed off by the erstwhile GCEO, dated 23 February 2010. No further schedule of payments were received by my Office.

Memo: Relocation to Umjantshi House Building

- 5.1.8.15 Further to the information mentioned above, there was a memorandum dated 08 July 2010 regarding the relocation of PRASA offices to Umjantshi House during November 2009.
- 5.1.8.16 The minutes of a meeting of the PRASA Board of Control (BoC) dated 21 May 2009 provides that the Committee noted that the acquisition of Umjantshi House and Lab Building was proceeded with as planned, the buildings were to be made available from 01 July 2009 and that Management was mandated to review the Capital Programme to raise funds for the acquisition of the two buildings, and that funds earmarked for the Signalling Project not be used for acquiring the two buildings.
- 5.1.8.17 As indicated above, the initial BoC Resolution and the Minister's approval, if any, relating to the purported date of the Agreement of Sale referred to therein as 27 March 2009, regarding the acquisition of Umjantshi House, were not made available to my Office.
- 5.1.8.18 The BoC Resolution 06-21/05/2009 provides that the Board approved that "*Capital Programme be reviewed to reallocate funds for the acquisition of the two buildings*". This indicates lack of prior proper budget approval by PRASA.
- 5.1.8.19 However, according to the Agreement of Sale, PRASA had already paid part deposit of **R20 693 750** (twenty million six hundred and ninety three thousand seven hundred and fifty rands) to Transnet, which begs the question regarding the initial source of funding and its approval.



5.1.8.20 The evidence received overwhelmingly indicates that Umjantshi House was purchased through a negotiated sales agreement between PRASA and Transnet.

Applicable Legislation: General Overview

- 5.1.8.21 Giving effect to section 217 of the Constitution, national legislation seeks to provide public functionaries, mainly accounting officers and authorities, with guidance regarding the key elements of a procurement system that is fair, equitable, transparent, competitive and cost effective. Practical measures need to be implemented to ensure that procurement by organs of state or public entities is undertaken in accordance with a system that encapsulate the principles stated herein above.
- 5.1.8.22 The legislative framework and prescripts, amongst others, include the Public Finance Management Act 1 of 1999 (PFMA) and applicable National Treasury Regulations (Treasury Regulations) and Guidelines, as well as the PRASA SCM Policy and related corporate prescripts. It also incorporates elements of financial management, particularly relating to the avoidance of financial mismanagement in the field of public procurement.
- 5.1.8.23 The legislative framework gives effect to the Constitutional principles such as fairness, equity, transparency and competitiveness and outline practices to be followed for a proper procurement process.
- 5.1.8.24 The six phase Supply Chain Management cycle, incorporating Demand Management, Acquisition Management; Logistics Management; Disposal Management; Risk Management; and Regular Assessment of Supply Chain Performance, that is captured in the PRASA SCM Policy at the time of the lodgement of the complaint, were similar to those espoused in paragraph 16A3.2 of Treasury Regulations, which seeks to provide an integrated framework that seeks



to simplify guidance and compliance with the legal framework for public functionaries involved in the procurement of goods and services.

5.1.8.25 The procurement plan of state entities should also form part of the initial phases of the acquisition process, as required in terms of the regulations issued in terms of the PFMA.

5.1.8.26 Compliance with the SCM policy translates to compliance with the Constitutional and legal policy framework. Similarly, a violation of the SCM Policy translates into contravention of the national legal framework on procurement.

Public Finance Management Act (PFMA), 1 of 1999

5.1.8.27 Although essentially setting standards for financial management, including financial controls, the PFMA's provisions have enormous implications for compliance and, to some extent, covers the general regulation of aspects of state procurement. Key provisions in this regard, are principally those relating to fiscal discipline or prudence and the duties imposed on accounting authorities and delegated officials.

5.1.8.28 It is the PFMA read with National Treasury Regulations and Guidelines issued under it that indicate all aspects regarding the responsibilities that the PRASA Board and erstwhile GCEO were required to comply with to escape a finding of maladministration or improper conduct, owing to tender and other related financial irregularities alleged by the Complainants.

5.1.8.29 It is notable that while the erstwhile GCEO of PRASA was not statutorily the accounting officer, as the PRASA Board is the Accounting Authority, however, through delegation he assumed delegated responsibilities in terms of the PRASA Delegation of Authority.

5.1.8.30 The preamble of the PFMA pronounces that, it seeks:

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

According to section 1 of the PFMA, *"a fruitless and wasteful expenditure means expenditure which was made in vain and would have been avoided had reasonable care been exercised"*; and *"irregular expenditure means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation"*.

5.1.8.31 Section 51(b)(ii) of the PFMA provides that an accounting authority for a public entity must take effective and appropriate steps to prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity. The provision also applies to officials with delegated responsibilities from the accounting authority of the relevant public entity.

5.1.8.32 Similarly, PRASA SCM Policy and/or other related corporate prescripts, and the PFMA together with the National Treasury Regulations and Guidelines impose a responsibility for demand management, which includes requirement that proper planning be in place when setting out a budget, and needs to be accordingly prioritised and budgeted for. The ideal situation is that a need should be identified, analysed and included in the planning documents (strategic/Business/Operations) and the procurement plan, and therefore be budgeted for.

5.1.8.33 Section 52 of the PFMA provides that:

"The accounting authority for a public entity listed in schedule 2 or a government business entity listed in schedule 3 must submit to the accounting officer for a



department designated by the executive authority responsible for that Public entity or government business enterprise, and to the relevant treasury at least 1 month or another period agreed by National Treasury before start of the financial year:

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

National Treasury Regulations, 2005

- 5.1.8.34 National Treasury Regulations, as indicated earlier, integrate all of the constitutional and legislative requirements for procurement and financial management and set out clear guidelines to facilitate legal compliance.
- 5.1.8.35 These regulations that provide the six phased Supply Chain Management System mentioned earlier and reproduced in the PRASA SCM Policy.
- 5.1.8.36 Key compliance requirements relevant to the quizzed conduct outlined in the complaints arise from the PRASA SCM Policy provisions espoused from the National Treasury Regulations of March 2005 (Treasury Regulations), issued in terms of the PFMA.
- 5.1.8.37 According to Paragraph 29.1.1 of the Treasury Regulations [Section 52 of the PFMA], the corporate plan of a public entity must cover a period of three years and must include- (a) strategic objectives and outcomes identified and agreed on by the executive authority in the shareholder's compact.

Cash Management [Section 7(1) of the PFMA]

5.1.8.38 According to paragraph 31.1.1 of the Treasury Regulations, the accounting authority of a public entity listed in Schedule 3 is responsible for ensuring, amongst others, efficient and effective cash management, which in terms of paragraph 31.1.2, amongst others, includes: *"(a)...; (b) making payments no earlier than necessary, with due regard for efficient, effective and economical programme delivery and the public entity's normal terms of account payments; and (c) avoiding pre-payments for goods or services (i.e. payment in advance of the receipt of goods or services, unless required by the contractual arrangements with the supplier."*

5.1.8.39 PRASA as a public entity was therefore required to avoid any prepayments relating to procurement, unless stipulated in the agreement entered into prior to effecting such prepayments.

Acquisition Management

5.1.8.40 In the absence of proof of compliance with its SCM Policy or corporate plan or related acquisition prescripts for the period in question, and the relevant PRASA Board resolution as well as the Minister's prior approval, if any, relating to the acquisition of Umjantshi House, PRASA's assertion that proper acquisition processes were followed remain a moot point and may not be sustained.

5.1.8.41 Nevertheless, the basic requirements espoused in the PRASA SCM Policy, PFMA and Treasury Regulations as well as related guidelines were applicable and compliance with the provisions thereof remained inevitable.

The Supply Chain Management Policy of PRASA, dated February 2009.

5.1.8.42 PRASA SCM Policy provides in paragraph 2.2 that PRASA, in compliance with section 217 of the Constitution, must ensure that when contracting for goods and/or

services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost effective.

5.1.8.43 According to paragraph 2.3 of the Supply Chain Management (SCM) Policy of PRASA, dated February 2009 (PRASA SCM Policy), the scope of the policy covers all procurement matters including, amongst others, purchases of goods, services, and movable and fixed (immovable) assets as well as Capital and Operations Expenditure.

5.1.8.44 Paragraph 9.3 of the PRASA SCM Policy provides that:

“The GCEO has the responsibility to... (9.3.8) Approve appointments, irrespective of value, outside of the normal process in emergency situations or other exceptional circumstances that threaten life, property or equipment or can have a major negative impact on the smooth and safe operation of critical services of PRASA in conjunction with Exco...”

5.1.8.45 Paragraph 11.3.6 of the PRASA SCM Policy provides that:

“Sole sourcing exist when there is only one source (supplier) available in the market. A sole source may make a special product or technology that no one else does. Where such a situation exist, competitive bidding is not advisable. All sole sourcing motivations must be submitted to the GCEO for approval prior to entering negotiations with the sole source”

5.1.8.46 The following is stated regarding single source/confinement clause 11.3.7:

“This occurs where the needs of the business preclude the use of the competitive bidding process and for practical reasons only one bidder is approached to quote for goods and/or service. This method can only be used for:-

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

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

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

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

Powers and Authority of the Board and Delegation of Authority of PRASA

Powers and Duties of the Board

5.1.8.49 Paragraph 1.1 of Powers and Authority of the Board and Delegation of Authority (PRASA Delegation of Authority), provides that the PRASA Board must seek

approval from the shareholder (Minister of Transport) when entering into, *inter alia*, the following transactions:

- (a) Entering into a transaction other than in the ordinary, regular and normal course of business;
- (b) Purchasing or disposing of any assets other than in the ordinary, regular and normal course of business; and
- (c) According to paragraph 1.1.2 (d), and in terms of section 54(2) of the PFMA, in the acquisition or disposal of a significant asset.

5.1.8.50 Paragraph 6. of the PRASA Delegation of Authority provides that the GCEO of PRASA had the authority to approve the acquisition or purchase of immovable property within the level of delegation up to a R 100 million (One hundred million rands).

5.1.8.51 The PRASA Board is empowered to exercise all the powers and authorities to lead, control and manage PRASA and to delegate any or all of such powers to an official(s), employee(s) and any other person, and/or to a committee(s) of PRASA, subject to existing PRASA Policies and the provision set out therein.

5.1.8.52 The approval of the Board should be obtained for all matters that are beyond the authority delegated therein.

5.1.8.53 According to the tender approval clause, there are various categories set out in the Delegation of Authority ranging from R10 million to R100 million for the GCEO. The maximum value for acquisition of immovable assets by the GCEO is set as R100 million;

5.1.8.54 Except for the Agreement of Sale and payment records between PRASA and Transnet, as well as the Board Resolution referred to herein above, I have not been

provided with other relevant acquisition documents, namely the SCM documents from demand to acquisition management in terms of the PRASA SCM Policy or the relevant corporate plan, if any, budget approval, written notification to National Treasury, the relevant initial board resolution taken prior to 27 March 2009 and the approval of the executive authority (the Minister) in respect of the acquisition of Umjantshi House.

5.1.8.55 Without proof of compliance with the acquisition requirements referred to herein above, as well as the relevant provisions of the PRASA SCM Policy, PFMA and Treasury Regulations and Guidelines by PRASA. I am unable to uphold PRASA's assertion that the process followed was in line with the relevant applicable prescripts and I am inclined to accept the information supplied by the Complainants and find that no proper procurement processes were followed.

5.1.8.56 Furthermore, I am persuaded to also find that procurement was not done in accordance with a system which was fair, equitable, transparent, competitive and cost effective, as no evidence to the contrary was submitted to my Office.

5.1.8.57 Both PRASA and the erstwhile GCEO were provided with section 7(9)(a) Notices, dated 04 February 2019, alerting them of the likelihood to make an adverse finding against them in the above regard and they have not provided me with evidence disproving the allegations. Nevertheless, the erstwhile GCEO failed to respond to the section 7(9)(a) Notice concerned, which was served by email on his Attorneys of record on 04 and 08 February 2019 respectively.

5.1.9 Regarding PRASA's alleged improper payment of salaries to Mr Pule Mabe, former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA amounting to fruitless and wasteful expenditure, and did PRASA's GCEO in relation thereto mislead the Exco and the PRASA Board:

Common cause

- 5.1.9.1 It is common cause that Mr Pule Mabe, former Executive Corporate Affairs Manager of the SARCC left its service during the financial period 2008/2009.
- 5.1.9.2 It is also common cause that Mr Mabe received salaries during the period concerned until August 2008.

Issues in dispute

- 5.1.9.3 The issue for my determination was whether PRASA improperly paid salaries to Mr Mabe after his resignation from its employment.
- 5.1.9.4 I have not been provided with evidence to prove that the erstwhile GCEO misled the PRASA Board about the alleged improper payment of salaries to Mr Mabe, as former Executive Corporate Affairs Manager during 2008/2009, after his resignation from PRASA that amounted to fruitless and wasteful expenditure.
- 5.1.9.5 The erstwhile GCEO in his response, dated 29 August 2013, denied that PRASA paid salaries to Mr Mabe after he had resigned and left PRASA's employment, and further denied that he misled EXCO and the PRASA Board that the employee was not on PRASA's payroll, but its predecessor, the SARCC. He asserted that Mr Mabe was employed by the SARCC from 2006 to 2008.
- 5.1.9.6 No information relating to when Mr Mabe left the service of the SARCC was provided by PRASA, as the information could not be retrieved, as alleged. I could

therefore not conclude with reasonable certainty that PRASA improperly paid salaries to Mr Mabe after his resignation.

- 5.1.9.7 In his response to the Notice in terms of section 7(4)(a) of the Public Protector Act, the Head of Legal Services, Mr Dingiswayo stated that according to the payroll section of PRASA, payroll information was not available as the system that captured the information was no longer available on the IT system, and that the personnel file also did not provide valuable information, as the last document on the file was dated 13 June 2007 and relates to the former employee's salary increase that was to be effected from 1 June 2007.
- 5.1.9.8 I also have made a provisional finding in the section 7(9)(a) Notice sent to the Chairperson of the PRASA Board, dated 04 February 2019, that, the failure by PRASA to provide Mr Mabe's employment records and pay schedules left much to be desired regarding PRASA's record management function, systems and controls and its failure to provide the relevant records to the Public Protector to conduct the investigation
- 5.1.9.9 In her response, dated 22 March 2019, to the section 7(9) Notice referred to above, the Chairperson of the PRASA Board, Ms Khanyisile Kweyama stated that in an attempt to assist in the investigation, PRASA sourced the IRP5 form of Mr Mabe for the period 2008/2009 from the South African Revenue Services (SARS).
- 5.1.9.10 The 2008 IRP5 form covered the period from 01 March 2007 to 28 February 2008 and indicated the number of periods worked and paid for through the Metrorail payroll.
- 5.1.9.11 The 2009 IRP5 form covered the period 01 March 2008 to 28 February 2009, and indicates the period worked by Mr Mabe as six (6) months period, from March 2008 to August 2008.

5.1.9.12 Ms Khanyisile Kweyama, the Chairperson of PRASA Board asserted in the above regard that the last salary paid to Mr Mabe was in August 2008. She denied the allegation that he left the service in 2009 and that PRASA does not have information that Mr Mabe was paid a salary after he resigned, as PRASA did not have the information to show when he resigned.

5.1.9.13 Further information that was provided related to **Volume 1 Report** and had been dealt with sufficiently therein.

5.1.9.14 The appointment letter dated 03 October 2006, provides that Mr Pule Mabe was appointed Acting General Manager: Marketing and Communications with effect from 01 October 2006. The resignation letter was however not provided.

5.2 Jurisprudence and Touchstones from previous Public Protector reports:

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

5.2.10 Touch stones or principles from previous Public Protector Reports were also considered. In this regard, principles regarding different responsibilities and processes in a valid supply chain process discussed in reports such as '*Against the Rules Too*', a report on allegations of improper procurement of the lease of office accommodation for the SAPS in the Sanlam Middestad building in Pretoria and the Transnet Building in Durban by the former National Commissioner of the South African Police Service (SAPS) and the Department of Public Works (DPW), were considered. In this report, the Public Protector made the following observations: that

it was important for an interpretation of the PFMA requirements to organs of state, including Treasury Regulations issued in pursuit of the PFMA, to transcend a mechanical adherence to the letter of the law and is aligned with the spirit and purpose of section 217 of the Constitution. This prominent observation also features in **Volume 1 Report** referred to herein above.

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

6 FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I make the following findings:

Issues substantiated by the evidence received

- 6.1 **Regarding PRASA's alleged improper procurement of Umjantshi House from Transnet in September 2009:**
- 6.1.1 The allegation that PRASA improperly procured Umjantshi House from Transnet in 2009 without following proper procurement processes and without proper budget approval, is substantiated.



- 6.1.2 PRASA's erstwhile GCEO represented PRASA in the signing of the Agreement of Sale with Transnet on 28 September 2009, that was further signed by Transnet representative on 13 January 2010 for the sum of **R129 500 000.00**, (one hundred and twenty nine million and five hundred thousand rands, including VAT), which purported to have retrospective effect from 27 March 2009, which conduct is found to be improper.
- 6.1.3 The amount of the contract was above the maximum value delegated to the erstwhile GCEO in terms of PRASA Board's Delegation of Authority and the process followed is found to be flawed and therefore constitutes improper conduct.
- 6.1.4 No approval of the Minister regarding the procurement of Umjantshi House, as required in terms of Paragraph 1.1 of the PRASA's Delegation of Authority, was provided by PRASA and in the absence thereof, the procurement process followed by PRASA is found to have been flawed and therefore improper.
- 6.1.5 The initial payment of **R21 500 000.00** (twenty one million five hundred thousand rands) made on 27 March 2009, prior to the signing of the agreement by the erstwhile GCEO on 28 September 2009 and a representative of Transnet on 13 January 2010 may constitute advanced payment in contravention of paragraph 31.1.2(b) and (c) of the Treasury Regulations and is therefore improper.
- 6.1.6 The conduct of PRASA in the above regard amounts to maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

Issues not substantiated by the evidence received

- 6.2 Regarding PRASA's alleged improper payment of salaries to Mr Mabe during 2008/2009 after his resignation from PRASA allegedly amounting to fruitless and wasteful expenditure as well as the alleged misleading of the EXCO and PRASA Board by erstwhile GCEO:**

- 6.2.1 No evidence was received to substantiate the allegation that there was improper payment of salaries made to PRASA's former Executive Corporate Affairs Manager during 2008/2009 after his resignation which resulted in fruitless and wasteful expenditure, and that the erstwhile GCEO misled the EXCO and PRASA Board in that regard. The allegations are therefore unsubstantiated by the evidence received.
- 6.2.2 However, as I was not provided with convincing evidence to disprove the allegations, I am persuaded to make a finding that the erstwhile GCEO and/or PRASA's failure to keep proper records or secure information and documents in this regard is substantiated and found to be improper.
- 6.2.3 I also find that the failure by PRASA to keep proper records resulting in failure to provide the relevant records to the Public Protector to conduct the investigation amounts to maladministration as envisaged in section 6(5) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

Issues not substantiated by the evidence received

- 6.3 **Regarding PRASA's alleged improper advancing of an upfront payment to a developer for the construction of an underground train station on the Bridge City Project:**
- 6.3.1 The allegation that PRASA made an improper upfront payment to a developer for the construction of an underground train station on the Bridge City Project is not substantiated by the evidence received.
- 6.3.2 PRASA entered into a Bridge City development agreements with Crowie Projects on 12 December 2007 and 22 February 2010 respectively.

- 6.3.3 Payment schedules obtained during the investigation revealed that total payments amounting to **R944 447 190.71** (nine hundred and forty four million four hundred and forty-seven thousand one hundred and ninety rands seventy one cents) were made by PRASA to the developer, Crowie Projects, during the period between 15 September 2010 and 31 January 2013.
- 6.3.4 PRASA was engaged in a Bridge City Development Project undertaken by Crowie Projects in which the development of the station and concrete box was integral. No conclusive evidence could be found that PRASA made an upfront payment to the developer.
- 6.4 **Regarding PRASA's alleged improper awarding of a CCTV cameras tender to Mr Vusi Twala, a board member at the time:**
- 6.4.1 The allegation that PRASA improperly awarded CCTV cameras tender to Mr Vusi Twala is not substantiated by the evidence received.
- 6.4.2 Mr Vusi Twala indeed had some or other interest in the CCTV cameras project as reflected in the minutes of the PRASA Board which provided that PRASA had accepted that Mr Vusi Twala had fully declared his interest with regard to the CCTV cameras project.
- 6.4.3 However no evidence was received during the investigation to substantiate the allegation that, Mr Vusi Twala, or his companies were improperly awarded a tender by Intersite, a subsidiary of PRASA to provide CCTV camera service.

6.5 Regarding PRASA's alleged improper engagement of various construction companies in respect of the 2010 Soccer World Cup Project:

6.5.1 The alleged improper engagement of various construction companies in respect of the 2010 Soccer World Cup Project, is not substantiated by the evidence received.

6.5.2 The investigation on specific contracts relating to the PRASA projects were comprehensively dealt with in the **Volume 1 Report**.

6.5.3 No specific details of which other construction companies were allegedly involved in the 2010 Soccer World Cup Project due to the irregular appointment by PRASA. I could therefore not make an adverse finding regarding the allegation concerned.

6.6 Regarding the Chairperson of the PRASA Board's alleged failure to disclose and manage a conflict of interest arising from his interest in Makana, alleged subsidiary of Cadiz, a company allegedly providing advisory service to PRASA on the Rolling Stock and Recapitalisation Project:

6.6.1 The allegation that the Chairperson of the PRASA Board failed to disclose and manage a conflict of interest arising from his interest in Makana, a company that was alleged to have been associated to Cadiz, a company which was alleged to be providing advisory service to PRASA on the Rolling Stock and Recapitalisation Project, is not substantiated by the evidence received.

6.6.2 Mr Buthelezi, the former Chairperson of the PRASA Board, had disclosed his interest in Makana and Cadiz. No evidence was found that the company concerned was providing advisory services to PRASA on the Rolling Stock Programme, as alleged.

6.7 Regarding PRASA's alleged improper appointment of Ms Shiela Boshielo, the wife of Mr. B Boshielo, the erstwhile member of the PRASA Board, as General Manager of Autopax:

6.7.1 The allegation that Ms Shiela Boshielo was improperly appointed by PRASA as General Manager of Autopax is not substantiated by the evidence received.

6.7.2 Ms Boshielo was appointed on 06 April 2010 as Executive Manager: Business Development after her application for the position advertised in the Sunday Times of 29 November 2009 was successful.

6.7.3 The evidence received also shows that she was transferred from the position of Executive Manager: Business Development to the position of Senior Manager: Regional Transportation Planning and Special Projects by the Acting Group Executive: HCM, Mr Monde Mondli through a letter dated 30 March 2012 on same terms and conditions of her employment.

6.8 Regarding the GCEO's alleged improper Blue Train trip to Cape Town together with ten (10) female companions during the period between 24 to 27 September 2009 and returned by SAA flight at an estimated cost of R170 000 amounting to fruitless and wasteful expenditure:

6.8.1 The allegation that the erstwhile GCEO improperly undertook a Blue Train trip to Cape Town with ten (10) female companions during 24 to 27 September 2009 and return by SAA flight at an estimated cost of R170 000.00 resulting in fruitless and wasteful expenditure to PRASA, is not substantiated by the evidence received.

6.8.2 The evidence received could not corroborate the allegation of the payment of R170 000.00 by PRASA relating to the alleged trip and subsequently incurring fruitless and wasteful expenditure.

6.9 Regarding the erstwhile GCEO's alleged improper transfer of Mr Stephen Ngobeni without a disciplinary process being followed for his alleged irregular appointment of a Training Contractor to provide training services on the handling of People with Disabilities:

- 6.9.1 The allegation that Mr Ngobeni is the erstwhile GCEO's cousin and that he transferred him without taking disciplinary action against him for the alleged appointment of a training contractor was not substantiated by the evidence received.

6.10 General observations

Distinctive benchmarks from Volume 1 Report:

- 6.10.1 *The transactions investigated and related findings revealed failure to comply with the SCM policy, particularly involving failure to test the market appropriately for competitive pricing, which culture may have cost PRASA millions in avoidable expenditure.*
- 6.10.2 *There also seems to be a culture of either poor information management or hiding of information that could provide evidence of maladministration and other forms of improper conduct.*
- 6.10.3 *If the pattern is not arrested it has the potential to derail the effective and efficient procurement of goods and services to support PRASA operations and consequently service delivery by this important national asset. Poor financial management also has implications for the national revenue as it may mean frequent yet preventable rescue funding.*
- 6.10.4 *Regarding PRASA's failure to provide information, it must be appreciated that public accountability via administrative bodies such as the Public Protector is not accountable to Complainants but to the public that entrusts public functionaries with public power and resources. It is, accordingly, not open to public functionaries to try and win a case by withholding or hiding information.*

7 REMEDIAL ACTION

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

7.1 The Minister of Transport to:

- 7.1.1 Take cognisance of the findings regarding the improper conduct and maladministration by PRASA relating to the irregularities mentioned in the report.
- 7.1.2 Include in his oversight role as the government shareholder representative with regard to PRASA, the monitoring of the implementation of remedial action taken in pursuit of the findings in terms of powers conferred under section 182(1)(c) of the Constitution.

7.2 The Chairperson of PRASA Board to ensure that:

- 7.2.1 The PRASA Board takes cognisance of the findings of maladministration and improper conduct referred to in this report.
- 7.2.2 The PRASA Board evaluates the effectiveness of its internal controls and systems on the Minimum Information Security Standards (MISS) with a view to take corrective action to prevent a recurrence of the improprieties referred to in this report.
- 7.2.3 All acquisition and disposal of significant assets by PRASA complies with the provisions of paragraph 1.1 (b) of the Delegation of Authority and section 54(2)(d) of the PFMA.
- 7.2.4 The PRASA Delegation of Authority is reviewed to provide for the requirement of the PRASA Board's prior approval of the agreement and payment for the acquisition

or disposal of immovable property within the level of delegation of the GCEO, which is up to a R100 million (One hundred million rands).

7.3 The GCEO of PRASA:

7.3.1 Evaluates the effectiveness of its internal controls and systems on the Minimum Information Security Standards (MISS) with a view to take corrective action to prevent a recurrence of the improprieties referred to in this report.

7.3.2 **Ensure that all staff members** responsible for information security, regarding the need for proper management and care of PRASA's records are trained for the entity to comply with the provisions of the National Archives Act, 43 of 1996

7.3.3 The acquisition and disposal of significant assets by PRASA complies with the provisions of paragraph 1.1 (b) of the Delegation of Authority and section 54(2)(d) of the PFMA.

7.3.4 Assists the e PRASA Board in reviewing the Delegation of Authority to provide for the requirement for the PRASA Board's prior approval of the agreement and payment for the acquisition or disposal of immovable property within the level of delegation of the GCEO, which is up to a R100 million (One hundred million rands).

7.4 The Office of the Chief Procurement Officer of the National Treasury to:

7.4.1 Take cognisance of the findings of the irregularities and remedial action mentioned in the report.

7.5 The Director of Priority Crimes Investigation (DPCI) to:

7.5.1 To investigate and arraign all the officials of PRASA responsible for destruction of records in violation of the National Strategic Intelligence Act and the Archives Act.

8 MONITORING

- 8.1 The Minister of Transport to submit an implementation plan indicating how the monitoring of implementation of remedial action, taken in pursuit of the findings in terms of powers conferred under section 182(1)(c) of the Constitution, referred to in paragraph 7.1 above will be implemented, within 30 days from the date of my final report.
- 8.2 The Chairperson of the PRASA Board to submit an implementation plan indicating how the remedial action referred to in paragraph 7.2 above will be implemented, within 30 days from the date of my final report.
- 8.3 The GCEO of PRASA to submit an implementation plan indicating how the remedial action referred to in paragraph 7.3 above will be implemented, within 30 days from the date of my final report.
- 8.4 All actions requested in the report as part of the remedial action taken in terms of the Public Protector's powers under section 182(1) (c) of the Constitution to be finalised within three months and a final report presented to the Public Protector.
- 8.5 Unless the remedial actions taken by the Public Protector are reviewed and set aside by the Court of law, compliance is not optional and same must be complied within the stated period.



ADV. BUSISIWE MKHWEBANE

PUBLIC PROTECTOR OF SOUTH AFRICA

DATE: 30, 04, 2019