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Zondo commission – Transnet’s reinstatement of Gama irrational, Zondo hears

Former Transnet group CEO Siyabonga Gama appears to have enjoyed “some power somewhere” in his bid to be reinstated as Transnet Freight Rail (TFR) CEO in 2011, despite losing in his legal endeavours. This was the observation of chairperson of the commission into state capture Deputy Chief Justice Raymond Zondo on Thursday.

Zondo heard the evidence of Christopher Todd, a director of Bowman Gilfillan, who provided legal services to Transnet at the time of Gama’s dismissal in June 2010. He told the commission of his repeated attempts to advise the board on the merits of its strong case against Gama – who had lodged an appeal against his dismissal with the bargaining council – but said his advice was ignored. The process was abandoned, and the board instead settled with Gama. By this time, Bowman had been replaced as legal advisors.

“Mr Gama could not have been reinstated because anybody thought that was a likely outcome of the arbitration,” said Todd, arguing that the prospects were good for Transnet to win, particularly because Gama had shown inconsistencies in his approach to the arbitration process.

Gama was first suspended in 2009 over three misconduct charges, two of which related to procurement irregularities, including an R18-million tender award to GNS, a company linked to close associate and former cabinet minister Sipiwe Nyanda.

He took Transnet to court in a bid to have his dismissal declared unfair, but lost and was ordered to pay costs. Some time later however, and following some negotiations, new board chairperson and acting GCEO Mafika Mkwanazi sought legal advice on the best route to get Gama reinstated. His first stop was Siyabulela Mapoma, a general manager in Transnet’s legal services department.

Mapoma testified on Wednesday that in his interactions with Mkwanazi, the latter cited an instruction from “higher up” than the minister as motivation. “Higher up, by assumption, was the Presidency,” said Mapoma. He told the commission that at a meeting in which Mkwanazi sought to negotiate reinstatement terms with Gama, the latter had told him that he wanted to return as GCEO of Transnet. Mapoma acknowledged that he did not hear Gama say this himself, but Mkwanazi had, as the two had moved away from the broader meeting.

For Todd, the board’s about-turn was odd and irrational. It could be inferred that the decision to reinstate Gama was already made, and this was just to find a way to make that happen, he said of the process of arbitration that was pending, but was later abandoned.

Zondo concurred: “What you say is very important, Mr Todd. And maybe there is merit in it. Because when you think about the merits of Transnet’s case, it’s difficult to rationally conclude that a settlement that included reinstatement, particularly a fully retrospective reinstatement, was justified.”

“If the board’s mindset was if Mr Gama is reinstated, we don’t mind him very much but let’s see what happens, the logical thing would be to let the arbitration decide. Either we’ll win the arbitration as our lawyers say we will, or if we don’t we’ll make do with it. But the fact that they decided not to run the arbitration, and then to capitulate, indicates that actually, they wanted Mr Gama to be reinstated irrespective of the outcome of the arbitration,” argued Todd. “That’s the only logical conclusion to draw under these circumstances.”

After deciding to abandon the arbitration and settle with Gama, Transnet would pay him benefits along with a back-paid salary and 75% of his legal costs to that point.

But Zondo argued that the question that should have preoccupied the Transnet board at this point was how they were ever going to discipline any executive after this?

“The settlement was the worst case for Transnet in the litigation. They were not trying to look after good governance in the reinstatement of Mr Gama. I can’t think of a reason where a board acting in a manner that is in the best interest of the company would ever do it. The likelihood, logically, is that the reason lies elsewhere,” said Todd.

A further show of the irrationality of the decision, said Todd, was that Transnet had instituted proceedings to get about R95-million from GNS after payments towards that contract had ballooned over time. However, on Gama’s return, the attitude towards that litigation process turned “lukewarm”. In fact, Gama argued before the board that there had been value for money in the GNS contract, despite having conceded its fraudulent nature during his disciplinary process.

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