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### **Zondo Commission – probe the judgments in Swifambo matter, Montana urges Zondo**

It was a case of Lucky Montana versus the judiciary at the state capture commission on Friday afternoon when the former Prasa CEO accused both a South Gauteng High Court judge and a full bench of the Supreme Court of Appeals (SCA) of irregularities in the infamous Swifambo contract court battle.

Montana said while he was not accusing any member of the judiciary of corruption, he remains unsettled by events of 2017, when the trains supply contract awarded to Swifambo Rail Leasing was taken to court by the then Prasa board.

Prasa awarded Swifambo a contract valued at R3.5-billion in 2012 to supply 70 passenger trains to augment its existing stock. In 2017 the high court found the contract to have been awarded irregularly, and set it aside. By this point, Prasa had paid R2.6-billion to Swifambo for the manufacture of the trains in a facility in Spain by sub-contractor Vossloh, a German company. Several more hundreds of millions were spent on tax, customs and transportation costs, said Montana, and the first 13 trains had been delivered.

The high court ruling was later upheld when Swifambo took the matter to the SCA. Although it was awarded during his tenure, Montana told the commission that the value of the contract fell outside of his authority of R100-million, and was thus essentially awarded by the board of the time.

Upon arrival in 2015, a new Prasa board led by former North West premier Popo Molefe launched a probe into this and several other major contracts predating its term. Law firm Werksmans Attorneys was appointed to carry out the investigation, and it was on the strength of their findings, as well as a report from then public protector Thuli Madonsela, that the board launched the court battle.

Montana, who followed the matter closely, told the commission that it was a pity for the country that the court had refused his application as *amicus curae*, and was therefore not fully informed on the merits of the contract because of the limited information from the board and Werksmans.

“I think it was very unfortunate, because I think the court dealt with a matter where there was huge misrepresentation. All the facts were not placed before the courts, but we respect the judgments by our courts,” said Montana.

Judge J Francis ruled in favour of Prasa in July 2017, and the contract was set aside. The SCA ruling came later, when Swifambo appealed. A final decision by the Constitutional Court in 2019, which refused to take on the matter as it saw no reasonable prospects of success for Swifambo, sealed the deal for the company, owned by Auswell Mashaba. It had already been under liquidation at the time of the high court process.

Conceding that he is in no position to take the decisions on appeal, Montana said he found certain irregularities in how the high court and SCA matters were handled. The first is that Montana alleged

in an affidavit to the commission that Judge Francis met privately with Molefe on the first day of hearings on the matter, and this he concluded when he saw the two men emerge from what he believed was the judge's chambers, just before proceedings began. Evidence leader Advocate Vas Soni challenged Montana on this, putting to him that logistically, that was impossible as the hearings venue and Francis' chambers were floors apart in the court building. To this, Montana replied by saying he was adamant the two emerged from an office close to the venue, which he at the time believed was the chambers.

Commission chairperson Deputy Chief Justice Raymond Zondo ruled at this point that, on the basis that Montana – who is not legally represented in the proceedings – had not been provided with a copy of the judge's affidavit, in which he denies the allegation, that aspect of evidence be revisited on a later occasion when this has been rectified.

On the SCA, Montana claimed that a portion of the judgment handed down contained the exact wording of an extract from an investigative report undertaken by Baselius Consilium Professional Services, a company appointed by Werksmans to handle the forensic aspect of the investigation. The extract, he said, was identical to what was in the report, word for word.

Soni told Zondo that like they did with Judge Francis, the commission's legal team had reached out to the SCA judge president with Montana's allegation, but had to date not received a response. Montana admitted that he used the commission as an opportunity to pursue the matter, as he was not prepared to carry the costs of submitting complaints about the two matters with the Judicial Conduct Committee, the body that investigates judges' conduct. Zondo said the commission might consider taking that route, given the limited time it has to conclude its business.

Montana asserted that more than being a case of him defending Swifambo, he felt the need to correct the misinformation in the public domain about his perceived corruption at Prasa. "Yes we respect the courts, but here we're seeing disgraceful conduct in my view. We're seeing conduct that is inappropriate."

Zondo replied to this point: "We in the judiciary have never said that the judiciary should not be criticised, but it should be fair criticism, it should be well informed. It should be based on facts, and not just generalisations and so on."

Montana refuted a claim made by Molefe in the latter's testimony that Swifambo was not capacitated to handle such a contract, and that the company was formed just months before the request for proposals went out in 2011. "I don't know when Swifambo was formed, the date or the period before that. But with bids of this nature that's what happens, because if a company bids – either an established company or people who form JVs [joint ventures] or the like – it happens. It's not unusual."

It would have been unreasonable for Prasa to expect a company to already exist in an environment where they would be expected to facilitate the manufacture of 70 trains. Even a parastatal like Transnet provides for the building of such facilities when it puts such a project out to tender, a luxury Prasa did not have.

He added that he met Mashaba for the first time only after Swifambo had been awarded, and did not favour him over other bidders, like Molefe claimed.

Montana concluded his testimony by denying another claim by Molefe that he solicited the support of former president Jacob Zuma when, after resigning from Prasa in July 2015, he wanted to return to his position against the wishes of the board.

He acknowledged that an intervention was indeed sought by former minister in Zuma's office Jeff Radebe and then transport minister Dipuo Peters, and they met Montana and Molefe at Zuma's presidential home in August. Montana said he presented his case, and Zuma commented that the public spat in which he and Molefe were involved was embarrassing for the ANC. The meeting ended after both men had placed their positions on the table, and Zuma excused them both so that he could talk to Radebe and Peters.

Montana is expected to return at a later date to complete his testimony.

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